

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

366

SOUTHERN PILOTS ASSOCIATION,
LEWIS H. HOLMAN, et al.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

AIR LINE PILOTS ASSOCIATION,

Intervenor.

On Petition for Review of Orders of the
Civil Aeronautics Board

United States Court of Appeals
for the District of Columbia Circuit

F.I. JAN 11 1963

Joseph W. Stewart

CLERK

PHILIP F. HERRICK

NICHOLAS E. ALLEN

1001 15th Street, N. W.
Washington, D. C.

Attorneys for Petitioners

MISSOURI
STATE LIBRARY

(i)

STATEMENT OF THE QUESTIONS PRESENTED

Petitioners' issues, as stipulated, are:

1. Did the Board have jurisdiction to hear the complaint filed by ALPA and to determine that Southern violated the Railway Labor Act?
2. (a) Were the Board proceedings invalid because petitioners, or some of them, were indispensable parties to the proceeding but were not made parties?
(b) Were the Board proceedings invalid because ALPA failed to represent the petitioners? (Note: This issue was added pursuant to order of the Court dated December 21, 1962.)
3. (a) Whether the Board's opinion and orders were only guidelines to the parties in their further negotiations, or whether they constituted a directive to Southern to discharge some and place the other replacement pilots at the bottom of the seniority list?
(b) Whether, if the answer to (a) is that the opinion and orders constituted a directive, the Board had authority to make such directive?
(c) Whether, regardless of the answer to (a), the Board erred in its conclusions in relation to job retention and seniority rights as set forth at pages 31 and 32 of its Opinion and Order E-18560 and in Order E-18737?
(d) Whether the record supports the Board's findings that the replacement pilots were hired without assurances of job and seniority rights as against the striking pilots?
4. Whether the Board's subsidiary findings as expressed in its opinion justify its conclusions that, beginning on July 12, 1960, Southern did not bargain in good faith and made illegal demands on ALPA?

Respondent's and intervenor's issues, as stipulated, are:

1. Whether the collective bargaining agreement entered into between Southern and ALPA has rendered moot the Board orders here challenged;

(ii)

2. Whether the petition for review was timely filed; and
3. Whether (a) petitioners timely pursued or exhausted their remedies before the Board, and (b) the provisions of Section 1006(e) of the Federal Aviation Act preclude the consideration by the Court of petitioners' contentions or any of them?

INDEX

	<u>Page</u>
Statement of the Questions Presented	(i)
Index and Table of Citations	(iii)
Jurisdictional Statement	1
Statement of the Case	2
Statutes Involved	4
Statement of Points	5
Summary of Argument	5
Argument	
I. The Board Did Not Have Jurisdiction to Hear the Complaint Filed by ALPA or to Determine That Southern Violated the Railway Labor Act	7
II. Petitioners, or Some of Them, Were Indispensable Parties to the Proceedings Before the Board	12
III. ALPA Was Under a Duty, Which It Did Not Fulfill, to Represent the Petitioners	15
IV. The Board's Orders Dictated the Substantive Terms of the Collective Bargaining Agree- ment and Are Therefore Unlawful	17
V. The Board Erred in Holding that Southern's Insistence on Job Retention and Seniority Rights for the Replacement Pilots Constituted Refusal to Bargain in Good Faith in Violation of the Railway Labor Act	19
VI. The Record Does Not Support the Board's Findings That the Replacement Pilots Were Hired Without Assurances of Job and Seniority Rights as Against the Striking Pilots	21
VII. The Board's Subsidiary Findings Do Not Justify Its Conclusions That Southern Did Not Bargain in Good Faith and Made Illegal Demands Upon ALPA	22
Respondent's and Intervenor's Issues	24
Conclusion	24

INDEX (Continued)

TABLE OF CITATIONS

	<u>Page</u>
<u>Cases:</u>	
* ALPA v. Southern Airways, C.A. No. 2982, D.C. M.D. Tennessee	12, 15, 21
American Air Lines v. Air Line Pilots Ass'n., 169 F. Supp. 177	10
Brady v. Trans World Airlines, 156 F. Supp. 82	10
Brotherhood v. Howard, 343 U.S. 763	9, 15
Brown v. Christman, 75 U.S. App. D.C. 203, 126 F.2d 625	14
Bullock v. Capital Air Lines, 176 F. Supp. 449	10
* Burlington Truck Lines v. U. S., 83 S.Ct. 239	11, 23
Conley v. Gibson, 355 U.S. 41	9, 16
* Consolidated Edison Company v. N.L.R.B., 305 U.S. 197	14, 15
Cunningham v. Erie R.R., 266 F.2d 411	16
Edwards v. Capital Airlines, 84 U.S. App. D.C. 346, 176 F.2d 755	9
Elgin J. & E. R.R. Co. v. Burley, 325 U.S. 711, rehearing 327 U.S. 661	9
Erie Resistor Corp. v. N.L.R.B., ___ F.2d ___	20
Farris v. Alaska Air Lines, 113 F. Supp. 907	10
Ford Motor Company v. Huffman, 345 U.S. 330	15
* Green v. Brophy, 71 App. D.C. 299, 110 F.2d 539	13, 14
Mount v. Locomotive Engineers, 226 F.2d 605 (CA 6), cert. den. 350 U.S. 967	16
N.L.R.B. v. American National Insurance Co., 343 U.S. 395	19
N.L.R.B. v. Insurance Agents International Union, 361 U.S. 477	19
N.L.R.B. v. Lewin-Mathes Co., 285 F.2d 871	20, 21
* N.L.R.B. v. Mackay Radio & Telegraph Co., 304 F.2d 333	19, 20, 21
N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261	14, 15
* N.L.R.B. v. Potlatch Forests, 189 F.2d 82	20, 21
Northwest Air Lines v. Machinists, 178 F. Supp. 853	10

INDEX (Continued)Cases (Continued):

	<u>Page</u>
Olson v. Miller, 105 U.S. App. D.C. 54, 263 F.2d 738	14
Outland v. CAB, 109 U.S. App. D.C. 90, 284 F.2d 224	11
Pan American World Airways v. T.W.U., 51 L.R.R.M. 2170	10
Sigfred v. Pan American Air Lines, 122 F. Supp. 881	10
* Steele v. L. and N.R. Co., 323 U.S. 192	9, 15
Terminal R. Assn. v. Brotherhood of R. Trainmen, 318 U.S. 1	19
Texas & N.O. R. Co. v. Brotherhood, 281 U.S. 548	8, 9, 10
Transcontinental Air Lines v. Koppal, 345 U.S. 653	10
Tunstall v. Brotherhood, 323 U.S. 210	9, 15
U.S. v. Bank of New York & Trust Company, 296 U.S. 463	14
Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515	9
Washington Terminal Co. v. Boswell, 75 U.S. App. D.C. 1, 124 F.2d 235	9
Williams v. Bankhead, 86 U.S. 563	14

Statutes:

Civil Aviation Act of 1938: Sec. 401(1)(4), 61 Stat. 141	8, 9
Federal Aviation Act of 1958: Sec. 401(a), 72 Stat. 754, 49 U.S.C. 1371(a)	4, 7
Sec. 401(g), 72 Stat. 754, 49 U.S.C. 1371(g)	4, 18
Sec. 401(k)(4), 72 Stat. 754, 49 U.S.C. 1371(k)(4)	1, 4, 7, 8, 10, 12
Sec. 1005(c), 72 Stat. 794, 49 U.S.C. 1485(c)	16
Sec. 1006, 72 Stat. 806, 49 U.S.C. 1486	(ii), 2, 24
National Labor Relations Act: 29 U.S.C. 150 et seq.	7
Railway Labor Act: Sec. 2, First, 45 U.S.C. 151a	8, 18
Sec. 2, Third, 45 U.S.C. 152	8
Sec. 2, Fourth, 45 U.S.C. 152	4, 8
Sec. 2, Fifth, 45 U.S.C. 152	8
Title II, 49 Stat. 1189, 45 U.S.C. 181	9

* Cases chiefly relied upon are marked by asterisks.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17,362

**SOUTHERN PILOTS ASSOCIATION,
LEWIS H. HOLMAN, et al.,**

Petitioners,

v.

**CIVIL AERONAUTICS BOARD,
AIR LINE PILOTS ASSOCIATION,**

*Respondent,
Intervenor.*

On Petition for Review of Orders of the
Civil Aeronautics Board

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

Citing Section 401(k)(4) of the Federal Aviation Act of 1958,
49 U.S.C. 1371(k)(4), as its authority, the Civil Aeronautics Board
undertook to hear and determine a complaint by Air Line Pilots
Association (ALPA), a labor organization, alleging that Southern

Airways, Inc. had failed to bargain in good faith. The proceeding culminated in a decision and two orders of the Board (Tr. 2558-2612, 2678-2680) wherein it found that Southern had not bargained in good faith, directed that it do so, and specified certain conditions which Southern should agree to as the basis for an acceptable agreement for reinstatement and seniority of the striking ALPA pilots and consequent discharge or downgrading of replacement pilots, petitioners herein.

This Court has jurisdiction of this appeal under Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 806, 49 U.S.C. 1486.

STATEMENT OF THE CASE

Petitioners are aircraft pilots employed by Southern Airways, Inc. (Southern) after June 5, 1960 (Tr. 2686), and the association which these pilots formed about September 25, 1962 (Tr. 2686). The individual petitioners were hired as replacements for other pilots, members of Air Line Pilots Association (ALPA), who engaged in a prolonged strike against Southern commencing June 5, 1960 (Tr. 2561).

Petitioners seek review of two orders of Respondent Board (CAB), No. E-18560, issued July 5, 1962, and No. E-18737, issued August 27, 1962, in a proceeding designated as Air Line Pilots Association vs. Southern Airways, Inc., CAB Docket No. 11,654 (Tr. 2612, 2678).

The proceeding was initiated on a complaint filed by ALPA July 22, 1960 which alleged that Southern had failed to bargain with it in good faith and had thereby violated the Railway Labor Act (45 U.S.C. 151) and the Federal Aviation Act of 1958 (49 U.S.C. 1301) (Tr. 1-9). Hearings were held before a CAB examiner from December 1, 1960 to January 18, 1961, but the individual petitioners herein were not made parties to the proceeding, they were not served with any notice of the proceeding, and none of them were called as witnesses at the hearing (Tr. 77, 81, 1118). Notices of the hearing which were published in the Federal Register recited only the time and place of a hearing involving

ALPA and Southern and did not recite any facts indicating that petitioners' employment rights were in jeopardy (25 Fed. Reg. 10372 and 10667).

ALPA is and was at all times mentioned herein the bargaining representative, certified as such under the Railway Labor Act, of all pilot employees of Southern (Tr. 2). Notwithstanding its obligation as their bargaining representative to represent all of the pilot employees of Southern without discrimination, ALPA opposed the interests of the petitioners throughout the proceeding (see, for instance, Tr. 3, 2562, 2584).

On July 5, 1962 the CAB issued its decision and order, No. E-18560, which directed Southern to bargain with ALPA (Tr. 2568-2612). The order also required Southern to reinstate all of the striking pilots who had been replaced after July 12, 1960 and to discharge or furlough as many of the individual petitioners as might be necessary in order to accomplish this (Tr. 2589, 2612). This order was modified August 27, 1962 by Order No. E-18737, which required Southern to give the reinstated pilots seniority over all of the individual petitioners, including those hired prior to any possible unfair labor practice (Tr. 2678-2680). Southern entered into an agreement with ALPA on September 21, 1962 which purported to comply with the Board's two orders and in which Southern agreed to dismiss the appeal it had taken to the Court of Appeals for the Fifth Circuit (this agreement is attached to Petitioners' Motion for Stay in this Court and to Intervenors' Opposition thereto). Petitioners were not parties to the agreement.

Within approximately one month after the agreement was made, petitioners and their association filed their petition for review in this Court. They also filed a petition with the Board for intervention, rehearing and reconsideration (Tr. 2586).

STATUTES INVOLVED

- I. Section 401(a) of the Federal Aviation Act (72 Stat. 754, 49 U.S.C. 1371(a)):

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

- II. Section 401(g) of the Federal Aviation Act (72 Stat. 754, 49 U.S.C. 1371(g)):

"The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

- III. Section 401(k)(4) of the Federal Aviation Act (72 Stat. 754, 49 U.S.C. 1371(k)(4)):

It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with Title II of the Railway Labor Act, as amended.

- IV. Section 2 (Fourth) of the Railway Labor Act (44 Stat. 577, as amended by 48 Stat. 1168, 45 U.S.C. 152 (Fourth)):

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.

STATEMENT OF POINTS

- I. The Board did not have jurisdiction to hear the complaint filed by ALPA or to determine that Southern violated the Railway Labor Act.
- II. Petitioners, or some of them, were indispensable parties to the proceeding before the Board.
- III. ALPA was under a duty, which it did not fulfill, to represent the petitioners.
- IV. The Board's orders dictated the substantive terms of the collective bargaining agreement and are therefore unlawful.
- V. The Board erred in holding that Southern's insistence on job retention and seniority rights for the replacement pilots constituted refusal to bargain in good faith in violation of the Railway Labor Act.
- VI. The record does not support the Board's findings that the replacement pilots were hired without assurances of job and seniority rights as against the striking pilots.
- VII. The Board's subsidiary findings do not justify its conclusions that Southern did not bargain in good faith and made illegal demands on ALPA.

SUMMARY OF ARGUMENT

- I. The Board lacked jurisdiction.
 1. The case is one of first impression. Despite its 24 years of existence, the Board has never before held that it has jurisdiction over unfair labor practice complaints.
 2. Under the old Civil Aviation Act, jurisdiction over such matters lay with the Courts, and the Civil Aeronautics Act makes no change.

3. Legislative history is non-existent, as contrasted with the legislative history about giving jurisdiction over unfair labor matters to the N.L.R.B.
 4. The Board lacks expertise in labor matters.
- II. Petitioners, or some of them, were indispensable parties.
1. Petitioners' employment contracts and livelihood were at stake in the proceedings before the Board, and these things were taken from them without their being before the Board.
 2. The above proposition is particularly true of the petitioners hired before the Board found that any unfair labor practices were committed.
- III. Under a line of Supreme Court decisions, ALPA was under a duty to represent, not oppose, the petitioners. If this involved it in a conflicting position, it was under a duty to make petitioners parties to the Board proceeding.
- IV. The Board exceeded its jurisdiction in telling Southern what it must yield to in bargaining with ALPA. The Board's directive constituted more than "guidelines."
- V. Southern had a right to insist upon job retention and replacement rights for petitioners. Replacement pilots, hired in good faith, need not be required to give way to returning strikers.
- VI. The record (set forth in the argument herein) does not support the Board's finding that petitioners were not promised permanence and seniority as against the striking pilots.
- VII. The Board erred in finding that Southern did not bargain in good faith and made illegal demands on ALPA. There is nothing to show that the Tennessee Federal Court's injunction was not effective.

ARGUMENT

I. The Board Did Not Have Jurisdiction to Hear the Complaint Filed by ALPA or to Determine That Southern Violated the Railway Labor Act.

In determining that it had jurisdiction, the Board relied primarily on Section 401(k)(4) of the Federal Aviation Act (49 U.S.C. 1371(k)(4)), which reads as follows:

"It shall be a condition upon the holding of a certificate by any carrier that such carrier shall comply with Title II of the Railway Labor Act, as amended."

The Board reasoned that since it is the agency which issues certificates (F.A.A., section 401(a); 49 U.S.C. 1371(a)), it necessarily has the authority to determine whether a carrier is in compliance with the Railway Labor Act. It recognized, however, that "the exact role the Board is to play in the enforcement of obligations placed on air carriers by the Railway Labor Act is unsettled" and it noted that this was a case of first impression (Tr. 2564).

The Board must have had some doubts about its jurisdiction because it held that while Section 401(k) gave it authority to determine unfair labor practice charges against a carrier, it had no such authority with respect to such charges against a union (Tr. 2586). If the Board's determination of its jurisdiction is upheld, there can be little doubt that it will possess substantially the same broad authority in the labor field with respect to air carriers as is possessed by the National Labor Relations Board with respect to other employers (see 61 Stat. 141; 29 U.S.C. 150 et seq.). It can enforce its orders through the powerful expedient of terminating or suspending a carrier's certificate.

As the Board observed, "the legislative history of Section 401(k)(4) is of little or no help." (Tr. 2564) Yet when viewed in the light of the history and background of the Railway Labor Act and the Federal Aviation Act, including its predecessor, the Civil Aviation Act of 1938

(61 Stat. 141), it seems incredible that Congress, by including a simple provision (section 401(1)(4) and section 401(k)(y) in the Federal Aviation Act) could have intended to grant such powers to the Board.

The Railway Labor Act (44 Stat. 577, 48 Stat. 1185, 45 U.S.C. 151), enacted in 1926, was intended to provide ways and means for the peaceful settlement of disputes involving rail carriers and their employees (Section 2, First; 45 U.S.C. 151a). It created certain specific rights for employees, including the right to designate representatives (Section 2, Third; 45 U.S.C. 152), the right to organize and to bargain collectively (Section 2, Fourth; 45 U.S.C. 152), and the right to be free from agreements not to join labor organizations (Section 2, Fifth; 45 U.S.C. 152). The Railway Labor Act gave the National Mediation Board no authority to enforce these rights or to impose any sanctions or remedial measures.

The question of the enforceability of rights created under the Railway Labor Act was resolved by the Supreme Court in Texas & N.O. R. Co. v. Brotherhood, 281 U.S. 548 (1930). There the Court upheld a decree of a Federal District Court enjoining the carrier from interference with the rights of employees under the Act. In determining that such rights were enforceable in the courts, the Court stated:

"It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings." [Page 567]

"If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose, as the present suit demonstrates." [Page 568]

"As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." [Page 569]

The question of enforceability by a court of rights under the Railway Labor Act was again before the Supreme Court in Virginian Ry Co. v. System Federation No. 40, 300 U.S. 515 (1937), where a labor organization which had been certified by the National Mediation Board brought an action for injunctive relief to compel the carrier to recognize it, bargain with it, and refrain from encouraging employees to affiliate with an organization formed by the carrier. In adhering to the principles enunciated in Texas v. Brotherhood, supra, the Court said (p. 545):

"It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts."

The enforceability of violations of the Railway Labor Act by the courts was firmly established before the enactment of Title II (49 Stat. 1189, 45 U.S.C. 181), which was added to the Railway Labor Act in 1936, before the enactment of the Civil Aeronautics Act of 1938. Resort to the courts to enforce rights created by the Railway Labor Act has been consistently upheld since the decision in Texas v. Brotherhood, supra.¹

The addition of Title II to the Railway Labor Act in 1936 conferred upon employees of air carriers all of the rights and duties contained in the 1926 Act except those contained in Section 3, which establishes and sets forth the duties and functions of the National Railway Adjustment Board. It was obvious at that time that air carrier employees, like railroad employees, could only resort to the courts for enforcement of their rights under the Railway Labor Act.

The Civil Aviation Act of 1938 included Section 401(1)(4), which required compliance with the Railway Labor Act as a condition of holding a certificate. Did this mean that Congress, without hearings or debate

¹ Steele v. L. and N.R. Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood, 323 U.S. 210 (1944); Brotherhood v. Howard, 343 U.S. 763 (1952); Conley v. Gibson, 355 U.S. 41 (1957); Elgin J. & E. R.R. Co. v. Burley, 325 U.S. 711 (1945), re-hearing 327 U.S. 661; Washington Terminal Co. v. Boswell, 75 U.S. App. D.C. 1, 124 F.2d 235; Edwards v. Capital Airlines, 84 U.S. App. D.C. 346, 176 F.2d 755.

on the question, decided to confer on the Civil Aeronautics Board (which was established by that Act) the authority to impose sanctions for unfair labor practices under the Railway Labor Act? When one considers the lengthy legislative history of the National Labor Relations Act,² such a conclusion seems implausible. Apparently no one thought at the time that the Board was so authorized. Air carrier employees, in accordance with the established decisions of the courts, continued to look to the courts for enforcement of their rights under the Railway Labor Act.³ It was not until some twenty-four years after the language of Section 401(k) had been adopted that the Board, in considering ALPA's complaint in this case, decided that this section had conferred upon it the broad power to enforce compliance with the Railway Labor Act and the right to hear and determine charges of unfair labor practices against an air carrier. The Board, after discussing the limited authority of the National Mediation Board, ignored the fact that beginning with Texas v. Brotherhood, supra, in 1930 the court decisions have held consistently that rights under the Railway Labor Act (except those covered by Section 3) are enforceable by the courts.⁴

² See, for example, Hearings before Committee on Education and Labor, U.S. Senate, 74th Cong., 1st sess., pp. 6, 21, 51-52, 60-66, 85-90, 131-134, 137, 280-282, 846, 850-851; Sen. Rep. 573, 74th Cong., 1st sess., pp. 5, 14, 16-17, 25; House Rep. 1147, 74th Cong., 1st sess., pp. 5-6, 14-19, 24; House Rep. 1371 (Conference Agreement), 74th Cong., 1st Sess., p. 4, Cong. Rec. Vol. 79, No. 2, pp. 7949-50, 7952, 7974.

³ Transcontinental Air Lines v. Koppal, 345 U.S. 653 (1953); Farris v. Alaska Air Lines, 113 F. Supp. 907 (D.C.W.D. Wash., 1953); Sigfred v. Pan American Air Lines, 122 F. Supp. 881 (D.C.S.D. Fla., 1954); Brady v. Trans World Airlines, 156 F. Supp. 82 (D.C.D. Del., 1957); American Air Lines v. Air Line Pilots Ass'n, 169 F. Supp. 177 (D.C.S.D. N.Y., 1958); Bullock v. Capital Air Lines, 176 F. Supp. 449 (D.C.E.D. N.Y., 1959); Northwest Air Lines v. Machinists, 178 F. Supp. 853 (D.C.D. Minn., 1959); Pan American World Airways v. T.W.U., 51 L.R.R.M. 2170 (D.C.E.D. N.Y., 1962, unreported otherwise).

⁴ See Footnote 1.

The Board's lack of expertise in labor relations matters is a factor which militates against the Board's asserted jurisdiction in this case. As observed in Outland v. CAB, 109 U.S. App. D.C. 90, 284 F.2d 224 (1960), "the Board's experience and expertise is with transportation, not labor relations." In that case this Court upheld the Board in declining to resolve a labor dispute relative to integration of conflicting seniority lists.

Only recently, in Burlington Truck Lines v. U.S., 83 S. Ct. 239, 245 (1962) the Supreme Court observed that "Expert discretion is the life blood of the administrative process" and that expertise is "the strength of modern government." In that case it reversed an order of the Interstate Commerce Commission for improperly injecting itself into labor relations matters beyond its competence. The Commission had determined to certificate a new interstate truck carrier for the purpose of providing services to communities previously served by other carriers whose operations had been interrupted by a labor dispute. In the Court's opinion the Commission should not have exercised its certificating power in lieu of other sanctions authorized by law, such as a cease and desist order, without having sufficient findings of fact and justification to support its choice of remedy. Therefore, the Court majority concluded the Commission's order was "an improvident exercise of its discretion." Justice Goldberg, with the Chief Justice and two other justices concurring, was of the opinion that the Commission had unduly encroached upon the jurisdiction of the Labor Board, the agency charged by law with responsibility for dealing with such labor disputes. He said, at page 249:

"... the additional certification, as the facts here plainly demonstrate, involved the Commission in intervention in the underlying labor dispute to a degree unduly entrenching upon the Labor Board's jurisdiction and the rights and duties of the affected parties."

Justice Black, dissenting in part, would have ordered the proceeding dismissed, without remand, on the ground the Commission exceeded its jurisdiction (p. 250).

Petitioners here contend that the Civil Aeronautics Board also has attempted to deal with a labor dispute in excess of its jurisdiction and beyond its competence. Instead of undertaking to determine whether Southern should retain its air carrier's certificate, a matter within its clear jurisdiction under Section 401(k)(4) of the Act, the Board sought to determine and resolve a serious and prolonged labor dispute by laying down detailed "guidelines" for the disputing parties. The Board did this despite its knowledge, as disclosed in its opinion, that a Federal court had determined the same basic issues, between the same parties, in a parallel case (ALPA v. Southern, Civil Action No. 2982, U.S.D.C., M.D., Tenn. 1962; see Board Decision and Order herein, July 5, 1962, Tr. 2565; minority opinion, Tr. 2593). In that case, the Court had found no failure to bargain in good faith on the part of Southern. Had the Board limited its concern to the enforcement of Section 401(k)(4), it could have relied upon the findings and conclusions of the Federal court, with the result that determination of the basic issues of the labor dispute could have been resolved by the agency of the Government to which this responsibility had been entrusted, viz., the federal judiciary.

If the Board had acted in this manner it would have exercised its powers within proper limits and due consideration would have been given to labor issues in an appropriate forum. Having acted contrary to these precepts, the Board has committed reversible error.

II. Petitioners, or Some of Them, Were Indispensable Parties to the Proceedings Before the Board.

When the ALPA pilots struck on June 5, 1960, Southern immediately began to recruit replacement pilots (see order of August 27, 1962, Tr. 2679). By July 12, 1960 about 52 of such replacements had been hired (Id.), and by July 27-28 there were about 100 (Tr. 2562, 2602). The replacement pilots were still flying for Southern at the time of the CAB order on July 5, 1962.

The employment contracts of the replacement pilots were largely oral (Tr. 761-4); nevertheless, they were contracts.

None of the petitioners were made parties to the proceedings before the Board, and none were served, although all were within the jurisdiction of the Board. None were notified of the hearing (see Notice of Hearing, Tr. 77, 81). None was even called as a witness (compare list of petitioners with witnesses at the hearing). Thus the rights of the petitioners to their jobs and to their seniority were adjudicated in their absence. The majority of the Board decided, without hearing them, that their employment was not permanent and that no promises were made to them about their seniority (Tr. 2576, 2577). The minority thought that their employment was permanent (Tr. 2608). The majority's decision on this point was a significant part of its overall decision, but the important thing is not what the Board found but that its finding was made in the absence of parties whose rights and livelihood were at stake.

"Indispensable parties have been defined by this court as 'All whose interests will be affected by the decree, that is, all persons materially interested either legally or beneficially in the subject matter of the suit . . .'" Green v. Brophy, 71 App. D.C. 299, 110 F. 2d 539 (1940). In the Green case, which involved an attempt by the A.F. of L. to recover from the C.I.O. monies which a local union had paid to the C.I.O. but allegedly should have paid to the A.F. of L., the Court said that the relationship between the A.F. of L. and the local was an issue, and that therefore the local was an indispensable party which "must affirmatively be given an opportunity to assert its rights." This Court pointed out that "the fact that litigation requiring decision as to the legal consequences to be attached to a relationship where only one party thereto is made a party to the action is perhaps the clearest case of failure to join an indispensable party." The District Court had dismissed the complaint. This Court affirmed, but remanded the case to the District Court with leave to the plaintiff to join the local union as a party if it could do so.

The Green case was followed in Olson v. Miller, 105 U.S. App. D.C. 54, 263 F.2d 738 (1959). These two cases point up the long-settled rule that persons with conflicting claims to a fund are indispensable parties to litigation involving that fund. Williams v. Bankhead, 86 U.S. 563 (1874); U.S. v. Bank of New York & Trust Company, 296 U.S. 463 (1936); Brown v. Christman, 75 U.S. App. D.C. 203, 126 F.2d 625 (1942). In the instant case, jobs, not a fund, are involved, but this is not a distinction.

In Consolidated Edison Company v. N.L.R.B., 305 U.S. 197, 59 S. Ct. 206 (1938), the N.L.R.B., on charges filed by a C.I.O. affiliate, invalidated contracts between the company and certain A.F. of L. affiliates which were not parties to the proceeding before the Board. The A.F. of L. affiliates entered the case for the first time by petition to the Circuit Court of Appeals, just as the petitioners in this case have done. The Supreme Court held that the contracts between the company and the A.F. of L. affiliates could not be invalidated in the absence of the A.F. of L. affiliates. In so holding, it said:

"We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. . . . The rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here" (p. 233).

The Supreme Court distinguished the situation in the Consolidated Edison case from that in N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261, 58 S. Ct. 571 (1938). In the Greyhound case, the Board invalidated a contract between the company and a company-dominated union which was not a party, and the Court affirmed this action. The distinguishing rationale appears to be that a company-dominated union is simply an arm of the company, and is therefore a party to the proceeding through the company itself.

The instant case is analogous to Consolidated Edison, not to Pennsylvania Greyhound. The petitioners here, while not organized, had employment contracts with Southern. There is no finding that they were company-dominated. Petitioners had, of course, a right not to organize, and therefore they had a right to make individual contracts. Had they been organized into a non-company-dominated union, that union would have been in the same position as the A.F. of L. affiliates in Consolidated Edison. That the petitioners were not organized can make no difference.

The petitioners' arguments are particularly cogent with respect to those replacement pilots who were hired prior to July 12, 1960,⁵ at which time approximately 52 had been hired. Even the majority of the Board held that the company committed no unfair labor practices prior to July 12. Under these circumstances, therefore, pilots hired prior to that date had to be parties to any proceeding which materially affected their rights.

III. ALPA Was Under a Duty, Which It Did Not Fulfill, to Represent the Petitioners.

ALPA had been designated and authorized by the National Mediation Board, under the Railway Labor Act, to act as the collective bargaining representative of the pilot employees in the service of Southern (Tr. 2, 2613). Section 2 of the Railway Labor Act requires ALPA to act on behalf of all the pilot employees, those who are its members and those who are non-members. Steele v. L. & N. R. Co., 323 U.S. 192, 65 S. Ct. 226 (1944); Tunstall v. Brotherhood, 323 U.S. 210, 65 S. Ct. 681 (1944); Brotherhood v. Howard, 343 U.S. 768, 72 S. Ct. 1022; Ford Motor Company v. Huffman, 345 U.S. 330, 73 S. Ct. 681;

⁵ The majority of the Board was mistaken in connection with the date of July 12, 1960. As the minority pointed out, the date should have been July 28 (Tr. 2593; see also Opinion of Judge Miller, ALPA v. Southern Airways, CA No. 2982, D.C. M.D. Tennessee, p. 31). By July 28 a larger number of replacement pilots had been hired.

Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957); Mount v. Locomotive Engineers, 226 F. 2d 605 (CA-6), cert. den. 350 U.S. 967; Cunningham v. Erie R.R., 266 F. 2d 411 (CA-2, 1959).

ALPA not only failed to represent the petitioners before the CAB, but it consistently took an adverse position (see, for instance, Tr. 2679).

If ALPA felt that it was in a conflicting position, the least it must have done was see that appellants were brought into the proceedings and into the negotiations. It did neither.

In this connection, Section 1005(c) of the Federal Aviation Act (49 U.S.C. 1485(c))) reads as follows:

"Service of notices, processes, orders, rules, and regulations upon any person may be made by personal service, or upon an agent designated in writing for the purpose, or by registered or certified mail addressed to such person or agent. Whenever service is made by registered or certified mail, the date of mailing shall be considered as the time when service is made."

No such service was made.

**IV. The Board's Orders Dictated the Substantive Terms
of the Collective Bargaining Agreement and Are
Therefore Unlawful.**

The Board's Opinion and Order (No. E-18560) of July 5, 1960 and its Order (No. 18737) of August 27, 1962 told the parties what the agreement must provide with respect to seniority and job retention rights of the pilot groups. In its opinion the Board said:

"We see no reason why the near agreement on economic issues reached by Southern and ALPA in the July 1960 meetings under the auspices of the National Mediation Board should not be the basis for the resumption of negotiations" (Tr. 2588).

And at Tr. 2589:

"Under these principles, Southern would be permitted to retain as permanent employees those replacement pilots hired prior to July 12, 1960; strikers replaced on or after July 12, 1960, would be entitled to reinstatement if they desire and so request, and if necessary Southern would be required to furlough or dismiss replacement pilots hired on or after July 12, 1960, to make room for them; and the seniority and other rights and privileges of the strikers should continue unimpaired. Further, strikers not reinstated because they were replaced prior to July 12, 1960, and replacement employees furloughed to make room for reinstated strikers should, if they request, be placed by Southern on a preferential hiring list for the filling of future vacancies in the order of their seniority. Southern would be permitted to discipline its employees as it sees fit, but any such action would be subject to statutory grievance procedures. In providing these guidelines we do not intend to preclude the parties from reaching an agreement which may differ therefrom. On the other hand, any substantial and unjustifiable deviation from these guidelines will, if persisted in, be taken into consideration in determining whether the requirement of good faith bargaining has been met."

In its "finding" No. 7 (Tr. 2591), the Board said:

"That Southern should be ordered to comply forthwith with its obligations under the Railway Labor Act to bargain

in good faith with ALPA, and compliance with such order should be achieved by Southern within a period of thirty (30) days after issuance thereof, failing which, Southern's authority to engage in air transportation would be subject to suspension or revocation pursuant to Section 401(g) of the Federal Aviation Act."

And then in its order of July 5, 1962 (Tr. 2612), the Board ordered that:

"1. Southern Airways, Inc., shall within thirty (30) days after issuance of this order bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act and in accordance with the attached opinion;

"2. The Board retain jurisdiction over this proceeding until further notice for the purpose of assuring compliance by Southern Airways, Inc., with this order."

Thus the Board ordered the parties to resume good faith bargaining, with a warning to Southern that any substantial deviation from the "guide lines" would subject it to possible loss of its air carrier certificate.

In its order of August 27, 1962 (Tr. 2678), the Board was even more explicit as to what should be incorporated in a collective agreement. At Tr. 2679, the order states:

"Upon consideration of Southern's petition, including the cases cited therein, the Board has determined that under its decision of July 5, 1962, Order E-18560, all strikers reinstated by Southern upon settlement of the strike, whether such reinstated pilots were captains or co-pilots or probationary pilots at the time of the strike, are entitled to their respective places on the seniority list, ahead of all the replacement pilots retained by Southern."

Thus the Board's orders put Southern on the spot. It must either accept the Board's "guide lines" or face loss of its operating authority. The Board's orders left Southern no room for bargaining. Its "guide lines" were actually directions.

The Board's orders here not only tell Southern that it may not insist on super-seniority for the replacement pilots, but proceeds to

spell out in definite terms the "guide lines" which the parties were expected to incorporate in the collective agreement. Such directions are contrary to the policies adopted by Congress and the Supreme Court.

Neither an administrative agency nor a court may properly dictate the substantive terms of a collective agreement. Thus, in Terminal R. Assn. v. Brotherhood of R. Trainmen, 318 U.S. 1, 63 S. Ct. 420 (1943), the Supreme Court said:

"The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions."

See also N.L.R.B. v. American National Insurance Co., 343 U.S. 395, 72 S. Ct. 824 (1952) and N.L.R.B. v. Insurance Agents International Union, 361 U.S. 477, 80 S. Ct. 419 (1960).

V. The Board Erred in Holding that Southern's Insistence on Job Retention and Seniority Rights for the Replacement Pilots Constituted Refusal to Bargain in Good Faith in Violation of the Railway Labor Act.

While petitioners do not concede that the Board had jurisdiction to hear and determine the merits of the unfair labor practices alleged by ALPA, the Board's conclusions with respect to Southern's insistence on job retention and seniority rights for the replacement pilots cannot be reconciled with judicial authority on the subject.

Notwithstanding the decision of the Supreme Court in N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938), which established the right of an employer to hire permanent replacements for economic

strikers, the Board attempted to justify its conclusions by (1) a finding that Southern did not find "it necessary to promise superseniority to the replacements in order to induce them to enter Southern's employ" (Tr. 2576-2577), and (2) by applying subjective considerations as to the impact upon the strikers of granting job retention and seniority rights to the replacements. Neither of these justifications has merit.

In N.L.R.B. v. Potlatch Forests, 189 F.2d 82 (CA-9, 1951), the Court, in denying an enforcement petition of the Labor Board, held:

"If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers." (Page 86)

In that case, which to some extent parallels the situation in the instant proceeding, the Court further held:

"The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent'; however, that assurance need not be proved. The Supreme Court in the Mackay Radio Case was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure. In this case Potlatch advocated 'strike seniority' before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter. Potlatch has, since prior to the settlement of the strike, endeavored to make the places of the replacements as nearly permanent as may be. The propriety of this concern was settled in the Mackay Radio case." (Page 86)

See also N.L.R.B. v. Lewin-Mathes Co., 285 F.2d 871 (CA-7, 1960).

The Court of Appeals for the Third Circuit in Erie Resistor Corp. v. N.L.R.B., ___ F.2d ___ (May 15, 1962; cert. grtd.), upheld the right of an employer to grant seniority to replacements. In denying enforcement of the Board's order, the Court said:

"We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however

motivated. We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. Whether the policy adopted by the Company in the instant case was illegally motivated we do not decide. The question is one of fact for decision by the Board."

The Court in ALPA v. Southern, Civil Action 2982, U.S.D.C. - M.D., Tenn., supra, with the same parties and roughly the same facts and issues before it as the Board in its proceeding, upheld Southern's right to insist on job retention and seniority rights for the replacement pilots under the principles established in Mackay Radio, supra, Potlatch, supra, and Lewin-Mathes, supra.

The Board's conclusions with respect to Southern's insistence on retaining and granting job retention and seniority rights to the replacement pilots cannot be reconciled with the foregoing cases.

**VI. The Record Does Not Support the Board's Findings
that the Replacement Pilots Were Hired Without
Assurances of Job and Seniority Rights as Against
the Striking Pilots.**

While Potlatch, supra, holds that a promise of permanent employment to replacement employees is not important, the Board majority makes it a sine qua non (Tr. 2573-2576), and finds that petitioners were promised neither permanence nor seniority over the striking pilots should they return (Tr. 2576-2577). The Board minority disagrees (Tr. 2599). So did the District Court in Tennessee (Opinion, p. 34). The examiner made no specific findings on this point.

The record itself is skimpy. An ALPA witness testified that in the negotiations the Company's "statements generally tended to go around the area that they had hired these people permanently and they were going to keep them" (Tr. 305). Wm. S. Magill testified for Southern

that he knew of no commitments to give seniority to the replacements and that he did not authorize any such commitments (Tr. 761-4).

Everett L. Martin, Director of Personnel for Southern, stated:

"We told them all that we thought it was going to be permanent . . . we thought it would be permanent, but something could happen" (Tr. 862-3). "We did not make any commitment as to duration . . . We told them we thought it was going to be permanent. That depended on their ability . . . We thought it was going to be permanent; however, something could always happen" (Tr. 920). "We made the commitment to this degree: we thought it was going to be permanent. If we hired a man as a captain he was going to stay as a captain. If we hired him as a co-pilot, he was going to stay as a co-pilot, that something could always happen. We didn't know. Maybe he wasn't qualified." (Tr. 921-2)

Martin also testified that between June 5 and July 28, 1960, many replacement pilots asked him what would happen if the strikers returned, and that he replied, "We thought it was going to be permanent" (Tr. 922).

President Hulse of Southern testified:

"Well, the company had employed the new pilots, there were nearly 100 on the payroll at that time. They had been employed in good faith, they had maintained service for the public during this difficult period and we certainly didn't think we could kick them out under the circumstances."
(Tr. 1083)

This appears to be the extent of the record on the subject. There is no substantial evidence to support the Board majority's finding that the replacements were promised neither permanent employment nor seniority.

VII. The Board's Subsidiary Findings Do Not Justify Its Conclusions That Southern Did Not Bargain in Good Faith and Made Illegal Demands Upon ALPA.

The Board found that Southern made two illegal demands upon ALPA beginning on July 12, 1960 and that after that time it did not

bargain in good faith. The alleged illegal demands were: (1) That Southern be permitted to retain the replacement pilots and give them seniority over the strikers, and (2) That Southern insisted upon the non-reviewable right to discipline strikers who have been guilty of violence.

The first point, that Southern could not insist upon job retention and seniority rights for the replacement pilots has already been covered in this brief. The second point, that relating to non-reviewable disciplinary action, was also subject of the proceedings in the District Court in Tennessee. In that case Judge Miller found that the striking pilots could not be deprived of their right to challenge, through grievance machinery, any disciplinary action taken against them, but that Southern's proposal in this respect was simply a counter-proposal to one made by ALPA, and that the strike was not converted into an "unfair labor practice" strike by the counter-proposal (Tennessee Opinion, p. 30). The Court, however, enjoined Southern from insisting upon non-reviewable discipline (Tennessee Opinion, p. 34).

The minority of the Board concluded that Southern's position of July 28, 1960 did not evidence an unyielding insistence on its counter-proposals, and it quoted its letter of this date to the Mediation Board (Tr. 2601).

There is nothing in the record to show that the Tennessee Court's injunction, which was issued on April 27, 1962 was not completely effective. There is therefore nothing to justify the action of the Board in requiring the return of the striking pilots with seniority. Such action constituted "an improvident exercise of its discretion," something that the Board should have been careful to avoid, "because of the possible effects of its decision on the function of the national labor relations policy." See Burlington Truck Lines v. United States, 83 S. Ct. 239, 244, 248.

RESPONDENT'S AND INTERVENOR'S ISSUES

Respondent and Intervenor have raised issues relating to (1) mootness, (2) timeliness, (3) exhaustion of administrative remedies, and (4) the substantial evidence rule (Federal Aviation Act, Section 1006(e); 49 U.S.C. 1486(e)). The first three of these issues are the subjects of a pending Motion To Dismiss the Petition for Review and have already been briefed to some extent by the parties. All of these issues raise matters of defense, and Petitioners will therefore cover them, to the extent they are not already covered, in their reply brief.

CONCLUSION

For the reasons stated, the Orders of the Board should be reversed and the proceedings should either be dismissed for lack of jurisdiction in the Board or remanded to the Board with appropriate instructions.

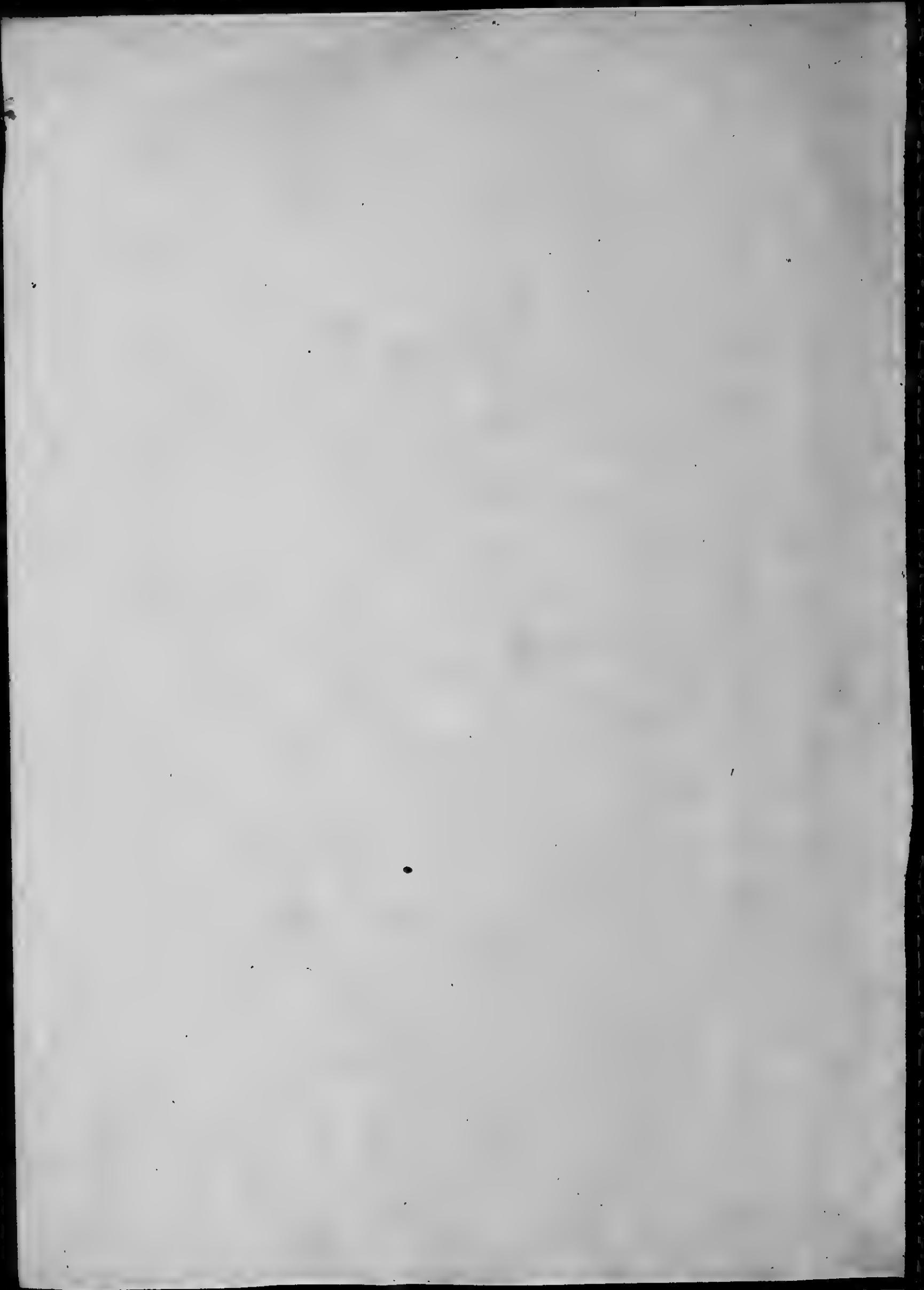
Respectfully submitted,

PHILIP F. HERRICK

NICHOLAS E. ALLEN

1001 15th Street, N. W.
Washington, D. C.

Attorneys for Petitioners



BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION,
LEWIS H. HOLMAN, et al.,

Petitioners,

v.

United States Court of Appeals
for the District of Columbia Circuit

CIVIL AERONAUTICS BOARD,

Respondent,

FILED FEB 25 1963

AIR LINE PILOTS ASSOCIATION,

Intervenor.

Nathan J. Paulson
CLERK

ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD

LEE LOEVINGER,
Assistant Attorney General,

JOSEPH B. GOLDMAN,
Deputy General Counsel,

LIONEL KESTENBAUM,
GERALD KADISH,
Attorneys,
Department of Justice.

O. D. OZMENT,
Associate General Counsel,
Litigation and Legislation,

JOHN H. WANNER,
General Counsel,
Civil Aeronautics Board.

PETER B. SCHWARZKOPF,
Attorney,
Civil Aeronautics Board.

(i)

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Petitioners' brief correctly states the questions, as stipulated, presented by the initial petition for review. By subsequent amendment, petitioners challenge the Board's Order E-19162, January 3, 1963, dismissing their petition to the Board for intervention, rehearing, and reconsideration. As a result, the additional issue is presented as to whether the Board erred in dismissing that petition.

(iii)

INDEX

	Page
Counterstatement of Questions Presented	(i)
Counterstatement of the Case	1
Statutes and Regulations Involved	9
Summary of Argument	9
Argument	12
I. The petition for review should be dismissed	12
A. The Board's orders and proceeding were rendered moot by the settlement by ALPA and Southern of their labor dispute	12
B. The petition for review was not timely filed, and the Court should not accept it as a late-filed one	16
II. There is no showing of error in the Board's proceeding or orders	18
A. The Board had jurisdiction to entertain and decide the ALPA complaint	18
B. The Board's orders were not improvident because a Federal District Court had entered a decision involving the same labor dispute, nor did those orders constitute a dictation of the terms of the ultimate agreement	26
C. Petitioners were not indispensable parties to the Board's proceeding, nor is there any showing of conduct by ALPA which would invalidate the Board's orders	31
D. The Board's findings that Southern had failed to bargain in good faith because of its insistence after July 12, 1960 on unlawful demands relating to discipline and seniority embody correct legal principles and are supported by substantial evidence	34

Index Continued	Page
1. The findings concerning discipline	34
2. The findings concerning seniority	36
3. The findings that Southern's insistence on its demands constituted a failure to bargain in good faith	41
Conclusion	44
Appendix	45

CITATIONS

Cases:

<u>ALPA v. Southern Airways, Inc.</u> , ____ F. Supp. ____ (Civil Action No. 2982, D.C.M.D. Tenn. 1962)	26, 27
<u>American Airlines, Inc. v. ALPA</u> , 169 F. Supp. 777 (S.D.N.Y. 1958)	43
<u>*American Overseas Airlines v. Civil Aeronautics Board</u> , 103 U.S. App. D.C. 41, 254 F. 2d 744 (1958)	25
<u>Ballas Egg Products, Inc. v. NLRB</u> , 283 F. 2d 871 (C.A. 6, 1960)	37
<u>Brandenfels v. Day</u> , ____ U.S. App. D.C. ____ F. 2d ____ (Case No. 16,642, Feb. 14, 1963)	21
<u>Burlington Truck Lines v. United States</u> , 371 U.S. 156 (1962) . . .	28
<u>Bus Employees v. Wisconsin Employment Relations Board</u> , 340 U.S. 416 (1951)	12
<u>Consolidated Edison Co. v. NLRB</u> , 305 U.S. 197 (1938)	31
<u>Douds v. International Longshoremen's Ass'n</u> , 241 F. 2d 278 (C.A. 2, 1957)	43
<u>*Federal Power Comm'n v. Idaho Power Co.</u> , 344 U.S. 17 (1952), rehearing denied, 344 U.S. 910 (1952)	16, 17
<u>*FTC v. Cement Institute</u> , 333 U.S. 683 (1948), rehearing denied, 334 U.S. 839 (1948)	21

Index Continued

Page

Cases:

	Page
<u>Ford Motor Co. v. Huffman</u> , 345 U.S. 330 (1953)	13, 33
* <u>General Drivers and Helpers Union v. NLRB</u> , 112 U.S. App. D.C. 323, 302 F. 2d 908 (1962), cert. denied, 371 U.S. 827 (1962)	43
<u>Holman, et al. v. Southern Airways, Inc. and ALPA</u> , F. Supp. (N.D. Ga. 1962)	7, 8, 17
<u>International Union of Electrical R.&M. Workers v. NLRB</u> , 303 F. 2d 359 (C.A. 3, 1962), cert. granted sub nom., <u>NLRB v. Erie Resistor Corp.</u> , 371 U.S. 810 (1962), argument February 18-19, 1963	37
<u>Jeffery-DeWitt Insulator Co. v. NLRB</u> , 91 F. 2d 134 (C.A. 4, 1937), cert. denied, 302 U.S. 731 (1937)	35
<u>Kent v. Civil Aeronautics Board</u> , 204 F. 2d 263 (C.A. 2, 1953), cert. denied, 346 U.S. 826 (1953)	25
<u>Mechling Barge Lines v. United States</u> , 368 U.S. 324 (1961) . .	13
* <u>Mills v. Green</u> , 159 U.S. 651 (1895)	12
<u>Mount v. Grand International Brotherhood of Locomotive Engineers</u> , 226 F. 2d 604 (C.A. 6, 1955), cert. denied, 350 U.S. 967 (1956)	33
<u>NLRB v. Borg-Warner Corp.</u> , 356 U.S. 342 (1958)	43
* <u>NLRB v. Calif. Date Growers Assoc.</u> , 259 F. 2d 587 (C.A. 9, 1958)	37
<u>NLRB v. Carlisle Lumber Co.</u> , 94 F. 2d 138 (C.A. 9, 1937), cert. denied, 304 U.S. 575 (1938)	35
<u>NLRB v. Erie Resistor Corp.</u> , 132 N.L.R.B. 621 (see International Union of Electrical R.&M. Workers, <u>supra</u>)	42
<u>NLRB v. Guistina Bros. Lumber Co.</u> , 253 F. 2d 371 (C.A. 9, 1958)	43
<u>NLRB v. Lewin-Mathes Co.</u> , 285 F. 2d 329 (C.A. 7, 1960)	37

Index Continued

Page

Cases:

* <u>NLRB v. Mackay R. & Tel. Co.</u> , 304 U.S. 333 (1938)	14, 30
<u>NLRB v. Pecheur Lozenge Co.</u> , 209 F. 2d 393 (C.A. 2, 1953), cert. denied, 347 U.S. 953 (1954)	43
<u>NLRB v. Pennsylvania Greyhound Lines</u> , 303 U.S. 261 (1938) . . .	13
* <u>NLRB v. Potlatch Forests</u> , 189 F. 2d 82 (C.A. 9, 1951) .	36, 37, 38
<u>NLRB v. Waterman S.S. Corp.</u> , 309 U.S. 206 (1940), rehearing denied, 309 U.S. 696 (1940)	39
<u>NLRB v. Wichita Television Corp.</u> , 277 F. 2d 579 (C.A. 10, 1960), cert. denied, 364 U.S. 871 (1960)	43
* <u>National Licorice Co. v. NLRB</u> , 309 U.S. 350 (1940)	26, 30, 31, 32
<u>North Central Airlines v. Civil Aeronautics Board</u> , 108 U.S. App. D.C. 185, 281 F. 2d 18 (1960)	18
* <u>Oil Workers Unions v. Missouri</u> , 361 U.S. 363 (1960) . . .	12, 13
* <u>Olin Mathieson Chemical Corp. v. NLRB</u> , 232 F. 2d 158 (C.A. 4, 1956), aff'd per curiam, 352 U.S. 1020 (1957) . . .	37
<u>Oughton v. NLRB</u> , 118 F. 2d 486 (C.A. 3, 1941), cert. denied, 315 U.S. 797 (1942)	31
* <u>Outland v. Civil Aeronautics Board</u> , 109 U.S. App. D.C. 90, 284 F. 2d 224 (1960)	13, 16
<u>Radio Officers Union v. NLRB</u> , 347 U.S. 17 (1954)	39
<u>Railroad Trainmen v. Chicago R.&I. R. Co.</u> , 353 U.S. 30 (1957), rehearing denied, 353 U.S. 948 (1957)	35
<u>Semi-Steel Casting Co. of St. Louis v. NLRB</u> , 160 F. 2d 388 (C.A. 8, 1947), cert. denied, 332 U.S. 758 (1947)	31
* <u>Skowhegan Sav. Bank v. SEC</u> , 91 U.S. App. D.C. 388, 201 F. 2d 702 (1952)	17, 18

Index Continued

Page

Cases:

<u>Slick Airways v. American Airlines</u> , 107 F. Supp. 199 (D.C.N.J. 1952), appeal dismissed, 204 F. 2d 230 (C.A. 3, 1953), cert. denied, 346 U.S. 806 (1953)	21
<u>Steele v. Louisville & N.R. Co.</u> , 323 U.S. 192 (1944)	33
* <u>Swarco, Inc. v. NLRB</u> , 303 F. 2d 668 (C.A. 6, 1962), petition for certiorari filed August 14, 1962, Case No. 335, 31 L.W. 3081	37, 39
<u>Texas N.O. R. Co. v. Railway Clerks</u> , 281 U.S. 548 (1930)	43
<u>Trainmen v. Toledo P.&W. R. Co.</u> , 321 U.S. 50 (1944)	43
<u>Union Pacific Railroad Co. v. Price</u> , 360 U.S. 601 (1959)	35
<u>United States v. Alaska S.S. Co.</u> , 253 U.S. 113 (1920)	13
<u>Western Air Lines v. Civil Aeronautics Board</u> , 194 F. 2d 211 (C.A. 9, 1952)	25, 28

Board Orders:

<u>National Airlines, Inc., Enforcement Proceeding</u> , Docket 3283, Order E-3389 (1948)	25
<u>Air Line Pilots Association and Air Line Stewardess'</u> <u>Association v. National Airlines, Inc.</u> , Docket 9045 and 9064, Order E-13445, January 29, 1959	25
<u>Flight Engineers' International Ass'n, AFL-CIO v.</u> <u>Western Airlines</u> , Docket 1223, Order E-17757, November 24, 1961	25

Statutes:

Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 et seq.:	
Sec. 401(g)	19, 29
Sec. 401(k)(4)	14, 18-22, 28
Sec. 1002	18, 19
Sec. 1006(a)	16, 17
Sec. 1006(e)	18

*Cases chiefly relied upon are marked by asterisks

Index Continued

Page

Statutes:

Railway Labor Act, 44 Stat. 577, as amended:	
Sec. 2	12, 43
Sec. 201	4, 18
Sec. 202	4, 18
Sec. 204	34, 35

Board Regulations:

Sec. 302.14 (14 C.F.R. 302.14)	7
Sec. 302.210 (14 C.F.R. 302.210)	31

Miscellaneous:

H. Rep. 2360, 85th Cong., 2d Sess., pp. 10-11	22
S. Rep. 1811, 85th Cong., 2d Sess., p. 22	22
H. Rep. 2556, 85th Cong., 2d Sess., p. 90	22
Hearings on S. 2 before a Subcommittee of the Senate Committee on Interstate Commerce, March and April 1937, pp. 450, 585, 590	22, 23
H.R. 9738, 75th Cong., 3d Sess. (1938)	23
Hearings on H.R. 9738 before the House Committee on Interstate and Foreign Commerce, March and April 1938, pp. 213, 215, 237-38	24

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION,
LEWIS H. HOLMAN, et al.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

AIR LINE PILOTS ASSOCIATION,

Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

The individual petitioners are pilots hired by Southern Airways as replacements for pilots who went on strike on June 5, 1960 (Unprinted Tr. 2686) after Southern and the Air Line Pilots Association (ALPA), the certified bargaining agent of Southern pilots (Tr. 1855), had been unable to reach agreement on a new labor contract. The petitioner Southern Pilots Association is an association of these pilots formed about September 25, 1962 (Unprinted Tr. 2686), shortly after

Southern and ALPA had concluded a new contract on September 21, 1962 which, inter alia, provided for the reinstatement of the ALPA pilots and the consequent displacement of some of the replacement pilots (Tr. 2756-70).

The petition seeks review of three Board orders entered in a proceeding involving the controversy between ALPA and Southern (ALPA v. Southern Airways, Inc., C.A.B. Docket 11654). The first order (E-18560, July 5, 1962, Tr. 2612) directed Southern to resume bargaining with ALPA in accordance with the Board's opinion, which set forth certain guidelines to be observed by Southern in the negotiations in order to constitute good faith bargaining as required by the Railway Labor Act. The second order (E-18737, August 27, 1962, Tr. 2678-80) is one reiterating the earlier guidelines in response to a petition by Southern for clarification. The third order (E-19162, January 3, 1963, Tr. 2779-81) dismissed a petition requesting the Board to permit petitioners to intervene, to reopen its proceeding, and to set aside the two earlier orders. Such petition was filed with the Board after the new ALPA-Southern contract had been concluded, and was dismissed, inter alia, on grounds that the Board lacked jurisdiction over the new contract and hence that there was ^{1/} no basis for further action by it. The petition for review does not challenge the new contract, and petitioners' apparent premise

^{1/} This petition to the Board was filed on October 29, 1962, after the filing on October 26, 1962 of the initial petition for review herein. An amended petition for review was accepted by this Court for filing on February 7, 1963 encompassing the Board's most recent order.

is that a setting aside of the Board's orders might provide a basis for rescission of the present labor agreement.

As indicated, there had been an earlier agreement between ALPA and Southern. On June 30, 1959, ALPA notified Southern that it desired changes (Unprinted Tr. 1434). There followed lengthy negotiation and mediation with the assistance of the National Mediation Board, but upon failure to reach agreement the ALPA pilots (some 137, Tr. 2765-67) went on strike on June 5, 1960. Subsequent to the strike Southern commenced hiring replacement pilots and gradually resumed full operations. By July 12, 1960, Southern had employed some 40-45 replacements (Unprinted Tr. 956).
^{2/}

Mediation continued after the strike, and by July 12, 1960, the major economic issues which had prevented agreement were settled, but the parties became deadlocked over the job retention rights and seniority status of the then 40-45 replacement pilots in relation to the striking pilots, and Southern's right to discipline the striking pilots for misconduct during the strike (Tr. 230-33, 244-45, 395, 421-22, 433, 939). Further negotiation and mediation failed to resolve this impasse (Tr. 393-94, 579 (Unprinted), 1825), and all bargaining ended with a mediation session on July 28, 1960. At the latter session both ALPA and Southern (with minor exceptions) accepted an advisory arbitration award made by the mediator which dealt only with the economic issues (Tr. 1823-25).

^{2/} Attachment (c) to the collective bargaining agreement (Tr. 2768) shows that only 31 of the pilots hired between June 5 and July 12, 1960 are still in Southern's employ.

On July 22, 1960, ALPA had filed a complaint with the Board (Unprinted Tr. 1-10) alleging, inter alia, that Southern had failed to bargain in good faith with it, in violation of the Railway Labor and Federal Aviation Acts.^{3/} The complaint requested that the Board take various actions against Southern, including a directive to it to resume bargaining. There followed full evidentiary proceedings before the Board to which ALPA, Southern, and the Board's Bureau of Enforcement were parties.^{4/}

The Board concluded that Southern had not exerted every reasonable effort to settle the dispute after July 12, 1960, and that the impasse was attributable to it because of Southern's insistence at that time upon granting unwarranted "superseniority" to the replacement pilots and reserving the right to discipline returning strikers without their being permitted recourse to statutory grievance procedures (Tr. 2585). The Board found that Southern's bargaining had been in good faith until July 12, 1960, and that it and ALPA should

^{3/} Section 401(k)(4) of the Federal Aviation Act (infra, p. 51) provides that:

"It shall be a condition upon the holding of a certificate [of public convenience and necessity] by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended."

Title II of the Railway Labor Act (infra, p. 47) in turn provides in effect that it shall be the duty of carriers to enter into good faith bargaining concerning employment conditions and labor disputes with the employees' representative designated by the National Mediation Board.

^{4/} These included evidentiary hearings before a Board examiner, briefs to the examiner, an examiner's report, exceptions thereto, and briefs and oral argument to the Board.

resume negotiations (Tr. 2590-91). The Board's opinion also set forth principles gleaned from relevant judicial decisions which the Board believed should be observed by Southern to constitute good faith bargaining in the further negotiations (Tr. 2558-2591). These were as follows (Tr. 2589):

" . . . Southern would be permitted to retain as permanent employees those replacement pilots hired prior to July 12, 1960; strikers replaced on or after July 12, 1960, would be entitled to reinstatement if they desire and so request, and if necessary Southern would be required to furlough or dismiss replacement pilots hired on or after July 12, 1960, to make room for them; and the seniority and other rights and privileges of the strikers should continue unimpaired. Further, strikers not reinstated because they were replaced prior to July 12, 1960, and replacement employees furloughed to make room for reinstated strikers should, if they request, be placed by Southern on a preferential hiring list for the filling of future vacancies in the order of their seniority. Southern would be permitted to discipline its employees as it sees fit, but any such action would be subject to statutory grievance procedures. In providing these guidelines we do not intend to preclude the parties from reaching an agreement which may differ therefrom. On the other hand, any substantial and unjustifiable deviation from these guidelines will, if persisted in, be taken into consideration in determining whether the requirement of good faith bargaining has been met." 5/

Subsequently, in response to a request by Southern for clarification of the Board's opinion, the Board entered its Order E-18737 wherein the Board stated that its earlier opinion meant that all strikers who were reinstated upon settlement of the strike "are entitled to their

5/. The Board had earlier stated its view that Southern was not required to accede to ALPA's demands and that these too had contributed to the impasse (Tr. 2584).

respective places on the seniority list, ahead of all the replacement pilots retained by Southern* (Tr. 2678-80).

On July 6, 1962, both Southern and ALPA filed petitions for review of the Board's principal order (E-18560). While Southern also filed a motion for a judicial stay of the order, the motion was never acted upon by the Courts.^{6/} Rather, Southern indicated that it intended to comply with the order to resume negotiations (Tr. 2666). Bargaining was resumed on July 16, 1962, again under the auspices of the National Mediation Board, and culminated in the new agreement of September 21, 1962 (Tr. 2756-71). That agreement provided for the withdrawal of the ALPA and Southern petitions for review, and such petitions were dismissed by stipulation on September 28, 1962. The agreement also confers seniority rights upon the striking pilots superior to those of the replacement pilots, with the effect that the replacement pilots serving as captains have been or may be reduced to co-pilots, and some of them and other replacement pilots furloughed to make room for returning strikers. However, all replacement pilots hired prior to July 12, 1960, and many of them hired thereafter, are to be retained in the employ of the company (see par. 2 of the agreement, Tr. 2758).

^{6/} Southern filed its petition in the Court of Appeals for the Fifth Circuit, and ALPA filed its petition in this Court. The ALPA petition was the earliest filed, and, on the Board's motion, the Southern petition was transferred from the Fifth Circuit to this Court (ALPA v. C.A.B., C.A.D.C. No. 17,149; Southern Airways v. C.A.B., C.A. 5, No. 19,801, this Court's No. 17,263).

Southern filed a petition for stay of the Board's order with the Fifth Circuit, but that Court did not rule upon the motion. Southern did not renew the motion in this Court after its case was docketed here on September 5, 1962.

The replacement pilots did not appear at or seek to intervene
in the Board's proceeding,^{7/} or take any other formal action with respect to asserting a right to seniority superior to that of the ALPA pilots, until after settlement of the labor dispute. As previously indicated, they appear to have formed their association around September 25, 1962. Thereafter, the following steps were taken by them: (1) on October 26, 1962, they filed their original petition for review herein; (2) on October 29, 1962, they filed a petition with the Board seeking leave to intervene in the administrative proceeding and requesting the Board to set aside its orders (Unprinted Tr. 2685-94); (3) on October 9, 1962, they filed a petition with the National Mediation Board (File #C-3322) requesting it to conduct an election of bargaining representatives in the hope that the replacement pilots' association will supplant ALPA as the bargaining representative with Southern; and (4) on or about November 2, 1962, they instituted a suit in the Federal District Court for the Northern District of Georgia against ALPA and Southern to enjoin the new collective bargaining agreement, on grounds that ALPA failed in its duty to properly represent the replacement pilots in its negotiations with Southern.

Hearings on the petition before the Mediation Board were deferred by that Board on November 26, 1962, pending decision in the instant and other litigation instituted by petitioners. The Georgia District

^{7/} Under the Board's rules (infra, p. 53), persons may appear and offer evidence in Board proceedings without the necessity of formal intervention.

Court case was dismissed on November 9, 1962, on grounds that the suit constituted an attack on the Board's orders, and it is understood that petitioners have noted an appeal to the United States Court of Appeals for the Fifth Circuit which is being held in abeyance pending the outcome of this case.^{8/}

The Board dismissed the petition filed with it, and review of the order of dismissal (E-19162, Tr. 2779-81) is sought by the amended petition for review accepted for filing herein on February 7, 1963. The Board's dismissal rested primarily on the grounds that there was no basis for further Board action, in that Southern and ALPA had resolved their dispute by entering into the new contract. The Board stated:

"The Board retained jurisdiction in this proceeding to insure that the carrier discharged its duty to bargain in good faith, and not for the purpose of passing on the merits of any contract which the parties might ultimately negotiate. There is no showing of any lack of good faith bargaining, and any altering or vacating of the Board's order would not in any way affect the contract over which we lack jurisdiction" (Tr. 2781).

The Board further stated that it did not consider that it could look behind the Mediation Board's designation of ALPA as the collective bargaining agent for Southern's pilots, or inquire into whether the union had discriminated against the petitioners in its representative functions (Tr. 2781). While finding the point unnecessary to its decision, the Board also noted that petitioners apparently had notice at all times of the Board proceeding and orders (Tr. 2781, n. 6).

^{8/} The District Court's opinion is in the unprinted transcript of record (Tr. 2747-55). Holman, et al. v. Southern Airways, Inc. and ALPA, ___ F. Supp. ___ (N.D. Ga., 1962). The Board was not a party to the case.

STATUTES AND REGULATIONS INVOLVED

The provisions of the Federal Aviation and Railway Labor Acts, and Board regulations principally involved, are set forth in the Appendix, infra, pp. 45 to 54.

SUMMARY OF ARGUMENT

I

The petition for review should be dismissed.

1. There is no controversy before the Court warranting decision by it, and therefore the case is moot. Subsequent to the Board's orders and while appeal from the first order was pending, ALPA, the certified bargaining agent, and Southern voluntarily entered into an agreement settling the strike. Petitioners do not, and cannot, attack that agreement in this Court. Nor would a reversal of the Board's orders in any way affect the validity of that agreement. Petitioners' complaint is in reality only against the agreement, not the Board's orders.

2. The petition for review was not timely filed. Petitioners had actual notice of the Board's order, and there are no reasonable grounds which should impel this Court to grant leave to file an untimely petition. The fact that the labor dispute has been settled mitigates against such leave being granted.

II

There is no showing of error in the Board's proceeding or orders.

1. The provisions of the Federal Aviation Act clearly give the Board jurisdiction to hear and determine violations by air carriers of the provisions of the Railway Labor Act. Section 401(k)(4) makes compliance with the Railway Labor Act a condition of an air carrier's certificate. Sections 1002 and 401(g) empower the Board to enforce any conditions "found by the Board" to have been violated. The legislative history of Section 401(k)(4) also indicates that Congress intended that the Board should determine such violations, and that the Board was so empowered for the special benefit of labor.

2. The Board's orders were not improvident because of the decision of a Federal District Court, in a simultaneous action involving the same labor dispute. The Board and the Court had concurrent jurisdiction for different purposes and on different issues. The Board was not a party to the District Court proceeding, and neither tribunal would be bound by the determination of the other.

The Board's orders did not dictate the terms of the agreement between Southern and ALPA. The Board merely set forth guidelines as to the minimum requirements of bargaining in good faith, as it was under a duty to do pursuant to its functions under Section 401(g) of the Federal Aviation Act.

3. Petitioners were not indispensable parties to the Board proceedings. The only necessary parties in the Board's proceedings

in exercising its public function were Southern and ALPA, the certified bargaining agent and complainant. In any case, petitioners had actual notice of the Board proceedings.

Nor did ALPA's conduct require the joining of petitioners. ALPA did not violate any obligation to represent petitioners, and petitioners' interests were vigorously asserted by Southern.

4. The Board's findings were correct and based on substantial evidence. The Board correctly found that Southern's demand relating to unreviewable discipline was illegal per se, and represented an act of coercion against union activities. The Board correctly found that Southern's demand relating to forfeiture of seniority by the strikers was unlawful, in that it constituted unwarranted discrimination against the strikers, far exceeding any preferential seniority policy sustained by any court, and the record failed to disclose any justification for such demand. Therefore the Board properly concluded that the demand must have been motivated by a desire to punish the strikers and discourage union activities.

The Board was also correct in finding that Southern's insistence on these unlawful demands constituted a failure to bargain in good faith on July 12, 1960. Having found an unfair labor practice on July 12, 1960, the Board correctly concluded that striking pilots not replaced prior to that date were entitled to reinstatement. The finding of Southern's insistence on its unlawful demand relating to discipline alone was sufficient to sustain the Board's orders.

ARGUMENT

I. The petition for review should be dismissed

A. The Board's orders and proceeding were rendered moot by the settlement by ALPA and Southern of their labor dispute

In the order now under attack, the Board found that Southern Airways, Inc. had violated its statutory duty under Section 2, First, of the Railway Labor Act to bargain in good faith by making certain demands in relation to the retention and seniority of replacement employees and in demanding nonreviewable disciplinary action against striking employees. After setting forth certain guidelines, the Board ordered Southern Airways to bargain in good faith. Accepting the Board's mandate, Southern and ALPA proceeded with negotiations, as a result of which they voluntarily entered into a collective bargaining agreement. Petitioners who are dissatisfied with the terms of this agreement now seek to attack the Board's order. The march of time, however, has made any attack on this order moot.

The duty of federal courts "is to decide actual controversies by a judgment which can be carried into effect, and not to express opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Mills v. Green, 159 U.S. 651, 653 (1895); see Oil Workers Unions v. Missouri, 361 U.S. 363 (1960); Bus Employees v. Wisconsin Employment Relations Board, 340 U.S. 416 (1951). We submit that the case before the bar falls within this admonition and presents only moot issues.

The attack on the Board order is similar to an attack on an injunction which has expired by its own terms and which has been held not to raise issues presenting any real controversy. Oil Workers Unions v. Missouri, supra; United States v. Alaska S.S. Co., 253 U.S. 113 (1920). Unlike such cases as NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938), the Board's order does not have continuing validity because of the threat of future violations. Here the Board's order was directed to a specific situation and did no more than require Southern Airways and ALPA to bargain in good faith. The parties bargained, and thereafter voluntarily entered into an agreement
^{9/} which left no further obligations under the Board's order. This having occurred, the order is "presently devoid of practical effect." Mechling Barge Lines v. United States, 368 U.S. 324, 328 (1961). Should this Court set aside the Board's order, no purposeful exercise of judicial power will have occurred. All the parties will still be in the same position. The contract between Southern Airways and ALPA

^{9/} "Seniority is a matter of negotiation" and contract. Outland v. Civil Aeronautics Board, 109 U.S. App. D.C. 90, 284 F. 2d 224, 228 (1960); see also Ford Motor Co. v. Huffman, 345 U.S. 330, 338-339 (1953). Southern's action in settling the labor dispute by contract was entirely voluntary in the legal sense. The Board's order, entered on July 5, 1962, granted the carrier a 30-day period within which to resume bargaining, and Southern did resume bargaining on July 16, 1962 (Tr. 2666), without awaiting action on its stay petition then pending before the Court of Appeals for the Fifth Circuit. Southern did not thereafter press its application for a stay nor did it pursue its appeal. On the contrary, the appeal was dismissed as a part of the settlement agreement.

will still be in effect and petitioners will still be subject to the
10/
same seniority provisions to which they object.

Petitioners seem to assume that reversal of the Board order is a necessary predicate to their attack upon the Southern-ALPA agreement. But the Board's order did not dictate the terms of the contract. It is true that the Board did issue certain guidelines for the parties to follow in negotiating. However, these guidelines were not binding upon Southern and ALPA in the sense of precluding other results. The Board made clear that, "In providing these guidelines we do not intend to preclude the parties from reaching an agreement which may differ therefrom" (Tr. 2589).

Granted that it went on to state that "any substantial and unjustifiable deviation from these guidelines will, if persisted in, be taken into consideration in determining whether the requirement of good faith bargaining has been met," still the parties were free to negotiate and come to the terms they desired.

It may be that the contract would not have been entered into had it not been for the Board's orders, but that does not render the contract an involuntary one or call for rescission if the Board

10/ Any desire by Southern to insist during the negotiations that the replacement pilots be retained was a "right" of Southern's in order "to protect and continue . . . [its] business" and not a right of the replacement pilots. NLRB v. Mackay R. & Tel. Co., 304 U.S. 333, 345 (1938). As such, the right to insist on retention of the replacements was one which Southern was free to bargain away.

erred. Even if Southern acceded to ALPA's demands under which it believed to be an inflexible mandate which required it to accept certain terms, Southern now seems to be satisfied. It is not protesting the contract nor did it enter into the contract subject to the outcome of its petition for review of the Board's order. Thus, though we submit that the Board's order did not force terms upon anyone, even if Southern did act on a contrary assumption, there is still nothing left of the Board's order for this Court to rule upon which can have any effect other than to decide abstract questions of law.

B. The petition for review was not timely filed, and the Court should not accept it as a late-filed one

Section 1006 of the Act (infra, p. 53) provides that appeals from Board orders must be filed within 60 days after their entry, and further provides that "after the expiration of said 60 days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

The Board's principal order (E-18560) was entered on July 5, 1962,
11/ and there were no petitions for reconsideration. Hence, the 60-day period for seeking review of the order expired long before the filing of the petition herein on October 26, 1962. While the petition was filed within 60 days after the Board's interpretive order of August 27, 1962 (E-18737), that order did not purport to reopen the matters contained in the earlier one, and hence should not serve to toll the statute. See Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20
12/ (1952). Furthermore, petitioners are not aided by the fact that they also petitioned the Board to set aside its order, and that the amended petition for review was timely filed in relation to the Board's order dismissing that petition. On the contrary, the denial of a petition requesting reopening of a matter does not serve as a vehicle for

11/ A timely filed petition for reconsideration tolls the time within which to seek review of Board orders. See Outland v. Civil Aeronautics Board, supra.

12/ The Board's initial order (Tr. 2589) stated plainly enough that the seniority rights of the strikers actually reinstated should continue unimpaired, and the subsequent order did no more than confirm the earlier one.

obtaining review of the initial order. See Federal Power Comm'n v.

Idaho Power Co., supra; Skowhegan Sav. Bank v. S.E.C., 91 U.S. App.

D.C. 388, 201 F. 2d 702, 705 (1952).

In our view, there are no grounds which should impel the Court to accept the petition for review as a late-filed one in relation to the Board's order of July 5, 1962. There is no contention that petitioners did not have notice of that order in ample time to file a petition for review within the statutory period. As the Board pointed out in its most recent order (Tr. 2781), petitioners had constructive notice of its proceeding by reason of Federal Register publication, conceded that they had actual notice of the Board's proceeding as early as the time of the examiner's decision, and the District Court for the Northern District of Georgia found that Southern gave full publicity in the Board's proceeding to various steps as they occurred. Moreover, petitioners informed the Board in effect (Tr. 2724-26) that they relied upon Southern to represent their interests and attempted to justify their belated request for participation in the Board's proceeding on grounds that they had been lulled into a false sense of security in this respect.

These matters should not constitute "reasonable grounds" within the Section 1006 meaning for accepting the instant petition and, as previously indicated, the public interest in settling labor disputes under the machinery of the Railway Labor Act points to rejection of

the petition in the exercise of the Court's discretion. See Skowhegan Sav. Bank v. S.E.C., ^{13/} supra, at 201 F. 2d 705.

II. There is no showing of error in the Board's proceeding or orders

A. The Board had jurisdiction to entertain and decide the ALPA complaint

The Board found (Tr. 2564-65, 2619-25) that it had jurisdiction to enter its orders under its general powers to hear and determine complaints of violation of the Act and requirements thereunder (Section 1002, infra, p. 52), and under Section 401(k)(4) which provides that "it shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended." Petitioners' threshold contention is that these provisions do not authorize the Board to determine whether a carrier is in compliance with Title II. Rather, petitioners' premise is that such determination must be made by some other tribunal, and that the Board's powers and duties are restricted to giving effect to that determination by revoking the certificate authority as an additional sanction to compel compliance (Br., p. 12). This position is contrary to the statutory language and its legislative history.

13/ We also note in this connection petitioners' suggestion that, had they participated in the Board's proceeding, they could have adduced evidence and advanced arguments which might have impelled different conclusions by the Board. However, their failure to appear prior to entry of the Board's order was not due to any lack of notice, and hence they should be barred from raising objections not timely urged to the Board. See Section 1006(e), infra, p. 53; North Central Airlines v. Civil Aeronautics Board, 108 U.S. App. D.C. 185, 281 F. 2d 18 (1960).

The very Section 401(g) provisions (infra, p. 50) relied upon by petitioners in support of their contention that the Board may only revoke a carrier's certificate for its failure to comply with the Railway Labor Act demonstrate that the Board is empowered to determine whether a violation has occurred and to direct obedience to the Railway Labor Act. A violation of the Railway Labor Act, or any other certificate condition, does not immediately subject the carrier's certificate to revocation. On the contrary, under Section 401(g), the Board may not revoke unless the holder first fails to comply within a reasonable time with "an order of the Board commanding obedience to ^{14/} the . . . condition . . . found by the Board to have been violated." This plainly states that the Board may determine the violation and that it must direct the carrier to comply.

Moreover, the order compelling compliance is entered pursuant to Section 1002, the general complaint provision (infra, p. 52). That section specifies that "it shall be the duty of the Board to investigate" any complaint "with respect to anything done or omitted to be done by any person in contravention of any provision of . . . [the] Act," and "if the Board finds, after notice and hearing, . . . that any person has failed to comply with any provision of . . . [the] Act or any requirement established pursuant thereto, the Board shall issue an appropriate order to compel such person to comply therewith."

^{14/} The requirement that there be a compliance order prior to revocation was for the special benefit of the carriers, just as the Section 401(k)(4) provision was for the special benefit of labor.

Obviously, a complaint against a carrier alleging a failure to comply with the Railway Labor Act would be one with respect to a thing "omitted to be done . . . in contravention" of the Section 401(k)(4) condition of the certificate.

The statute thus does not differentiate with respect to enforcement matters between Section 401(k)(4) certificate conditions and ones imposed by the Board, and there is no basis for giving these provisions anything other than their literal interpretation. The only other administrative agency having any jurisdiction with respect to the Railway Labor Act is the National Mediation Board, and that agency does not have power to determine violations of the Railway Labor Act or to direct action by anyone. Hence, except for the Board, these matters can be dealt with only by a court. The courts need no assistance from the Board in enforcing their decrees, and Congress must have meant more in enacting Section 401(k)(4) than that the Board would aid the courts in compelling obedience to their injunctions.

Furthermore, the Board's function is to insure that carriers comply with the conditions in their certificates in order to protect the public interest, and it is empowered to act on its own initiative. Courts on the other hand may act only in response to a complaint by a person asserting a valid legal claim and even then grant or withhold relief in accordance with equitable principles. The situation here presented is one in which there is concurrent jurisdiction in the courts and the Board with respect to certain violations of the

Railway Labor Act. The Board's jurisdiction extends only to compelling compliance by air carriers, and as shown by the legislative history, this jurisdiction was for the particular benefit of labor. The courts have jurisdiction broader than that of the Board to deal with labor matters, including determinations at the instance of air carriers. There is nothing unusual in there being a situation in which both courts and administrative agencies have concurrent jurisdiction or in which both administrative and judicial remedies are provided. See F.T.C. v. Cement Institute, 333 U.S. 683 (1948), reh. denied, 334 U.S. 839 (1948); Slick Airways v. American Airlines, 107 F. Supp. 199 (D.C.N.J. 1952), appeal dismissed, 204 F. 2d 230 (C.A. 3, 1953), cert. denied, 346 U.S. 806 (1953); cf. Brandenfels v. Day, C.A.D.C. No. 16,642, decided February 14, 1963. Contrast, also, Sections 902, 903, and 1007 of the Federal Aviation Act providing civil, criminal, and injunctive sanctions against violators with Sections 1002 and 401(g) providing administrative sanctions (72 Stat. 784, 786, 796, 788, 754, 49 U.S.C. 1472, 1473, 1487, 1482, 1371, respectively).

Moreover, the legislative history points to the fact that the Board was intended to have jurisdiction to determine violations and to enforce the Railway Labor Act against air carriers. The initial proposal for what is now Section 401(k)(4) was made by ALPA to the Senate Committee on Interstate Commerce in terms essentially the same as the

15/ present provision. In urging its adoption, David L. Behncke, ALPA's president, stated that its purpose was to provide effective enforcement of labor's rights under the Railway Labor Act, particularly in respect to operations in foreign countries, where resort 16/ to the courts was not always an effective remedy. Other testimony

15/ The proposal was as follows: "That the holder of such certificate shall comply with all the provisions of title II of the Railway Labor Act and any future amendments thereto."

Section 401(k)(4) was first enacted as Section 401(l)(4) of the Civil Aeronautics Act and was carried forward without change into the Federal Aviation Act. As a matter of simplicity in draftsmanship, the Civil Aeronautics Act was reenacted in 1958, rather than amended. Congress did not intend "to either adopt or reject administrative interpretations or practices, or judicial decisions under the present law," and reenactment of existing provisions was to be considered "as an absolute neutral factor in any question of interpretation which may arise in the future." H. Rep. No. 2360, 85th Cong., 2d Sess., pp. 10-11. See, to the same effect, S. Rep. No. 1811, 85th Cong., 2d Sess., p. 22; H. Rep. No. 2556, 85th Cong., 2d Sess., p. 90.

16/ Hearings on S. 2 before a Subcommittee of the Senate Committee on Interstate Commerce, March and April, 1937, p. 585.
Mr. Behncke stated:

". . . It is not always possible to enforce American laws in foreign countries even though American companies are financed by American dollars. It is, however, very easy to enforce a condition of a contract or a certificate of convenience and necessity because then you control the situation through the purse strings of the United States Treasury which is paying the bill. In other words, this provision of the pilots' proposed amendment to S. 2 makes compliance with the Railway Labor Act a condition of the holding of a certificate of convenience and necessity. . . . In other words, in a situation of this kind, a condition of contract or the holding of a certificate of convenience and necessity would be far stronger than an American law which these companies would very quickly find an excuse to violate, and an enforcement would be seriously handicapped."

by him stressed the uncertainties of the extraterritorial effect of the Railway Labor Act. "In order to insure, therefore, that all air carriers engaged in scheduled transportation shall continue to be covered by the Railway Labor Act, it is necessary that this amendment be included in the bill" (id., at 590).

The air carriers opposed, on grounds that the provision would make the aviation agency the enforcing one for the Railway Labor Act.^{17/} Moreover, the very proposition for which the petitioners here contend, i.e., that the Board should act only after some other tribunal had determined the violation, was rejected. Thus, H.R. 9738, 75th Cong., 3d Sess. (1938) contained a provision that a violation of the Railway Labor Act, when certified to the agency by the National Mediation Board, would constitute a violation of the Civil Aeronautics Act, and provided for suspension of a carrier's permit as a penalty. Mr. Behncke, in testifying on this bill, told the committee that this provision was "inadequate, ineffective and would offer little or no protection to the pilots and other air workers if enacted into law."

^{17/} Edgar S. Gorrell (id., at 450), president of the Air Transport Association and principal carrier representative, opposed the provision in relation to a bill which would have placed regulatory responsibility in the Interstate Commerce Commission. He testified:

" . . . However, by the amendment which the pilots propose, a violation of the Railway Labor Act would be made a violation also of the Interstate Commerce Act. Thus, to the penalties of the Railway Labor Act, would be added all the penalties provided by this Act or this part; and the amendment necessarily would make the Interstate Commerce Commission the enforcing agency for the Labor Act so far as the air-line employees are concerned. . . ."

He stated that the provision as to the certification of a violation by the National Mediation Board was unworkable since the National Mediation Board was "not capable under the law of certifying to a violation" that its "functions are strictly conciliatory. It is mediation."^{18/}

In lieu of this proposal, Mr. Behncke proposed the same amendment which he had earlier proposed to the Senate Committee (id., at 237-238). Additionally, he proposed a penalty provision requiring mandatory suspension of a certificate for a Railway Labor Act violation, and made clear his view that the question of violation would be determined by the aviation agency after hearing.^{19/}

Thus, both the plain language and the legislative history support the Board's determination that it had jurisdiction. Moreover, that jurisdiction cannot be avoided by petitioners' contentions that the Board lacks expertise in labor matters, and hence should not be entrusted with the determination. The Board deals with a great many

^{18/} Hearings on H.R. 9738 before the House Committee on Interstate and Foreign Commerce, March and April, 1938, pp. 213, 215.

^{19/} ". . . [T]his is what might be termed as a penalty section, which, as I stated Friday, is absolutely fair to the carriers because compliance is the penalty and no action can be taken against any carrier on any violation of the entire labor section that we are proposing before hearings have been held by the Authority or Commission or whoever will finally administer this law and even then if the carrier is found to be in violation the penalty is compliance. . . ." (id., at 238).

labor problems. Thus, the Board regularly imposes labor protective conditions in relation to mergers (see Western Air Lines v. Civil Aeronautics Board, 194 F. 2d 211 (C.A. 9, 1952)), and in one instance integrated seniority lists in circumstances in which employees were unable to reach agreement. Kent v. Civil Aeronautics Board, 204 F. 2d 263 (C.A. 2, 1953). Indeed, as this Court pointed out in American Overseas Airlines v. Civil Aeronautics Board, 103 U.S. App. D.C. 41, 254 F. 2d 744, 750-51 (1958), the Board cannot avoid the discharge of its functions because labor problems are involved. The Court remanded that case to the Board for a determination of whether strike losses were incurred in the course of economic and efficient management, an issue necessarily contemplating that the Board would determine (as here) the merits of the carrier's position with respect to the strike there
^{20/} involved.

^{20/} We also note petitioners' statement that the Board has not heretofore held that it had jurisdiction to determine whether a carrier is in compliance with the Railway Labor Act. While this factor in any event would not militate against jurisdiction in the Board, the short of the matter is that the Board has had several complaints filed with it over the years and this simply is the first one which has been finally decided on its merits. The Board's Bureau of Enforcement has asserted jurisdiction on the Board's behalf at least since 1948. National Airlines, Inc. Enforcement Proceeding, Docket 3283, dismissed by Order E-3389 after the settlement of the dispute. See, also, Air Line Pilots Association and Air Line Stewardess' Association v. National Airlines, Inc., Docket 9045 and 9064, Order E-13445, January 29, 1959, where the Board dismissed such a complaint on the ground that the strike was over and the complainants had obtained relief without intervention of the Board, and hence that the complaint did not warrant further investigation or action. In Flight Engineers' International Ass'n, AFL-CIO v. Western Air Lines, Docket 1223, Order E-17757, November 24, 1961, the Board similarly dismissed such a complaint on the grounds that the complaint did not state facts which would justify an investigation or action by the Board. In neither of these cases did the Board question its jurisdiction to consider the complaint.

- B. The Board's orders were not improvident because a Federal District Court had entered a decision involving the same labor dispute, nor did those orders constitute a dictation of the terms of the ultimate agreement

Petitioners assert that the Board's orders were improvident in that the Federal Court for the Middle District of Tennessee had entered a decree which would have been effective with respect to the labor controversy (Br., pp.12, 23). Their point presumably is that the Court's judgment would have served to require a resumption of bargaining between ALPA and Southern, and that a result more favorable to them might have ensued in such bargaining in light of the Court's opinion than actually resulted. Petitioners' argument is misplaced for the reason that it ignores the fact that the Court and the Board had concurrent jurisdiction for different purposes and on different issues. The Board as the agency charged with the responsibility for the subject matter of air transportation is under an affirmative duty in appropriate cases to insure that the Federal Aviation Act is enforced in terms of public interest considerations. Cf. National Licorice Co. v. NLRB, 309 U.S. 350 (1940). The District Court is charged, on the other hand, with litigating the issues brought before it by the parties. As a matter of fact, the District Court recognized that, "The Civil Aeronautics Board has before it numerous factual issues which are not involved in the present case, and its final determinations would be neither res judicata nor a

guide to the Court in its findings and conclusions on the issues here involved" (Unprinted Tr. 2516).
21/

The Board was not a party to the proceeding before the District Court and was acting under the duties imposed upon it for the protection of the public. ALPA v. Southern, Civil Action No. 2982 (D.C. M.D. Tenn., 1962). The District Court found that Southern had committed an unfair labor practice in insisting on a nonreviewable right to discipline the striking pilots (Unprinted Tr. 2531-36). The Court differed with the Board and ruled that Southern's insistence that the striking pilots lose all seniority rights was not unlawful (Unprinted Tr. 2530). Nevertheless, the Court's determination not to enjoin Southern from insisting on retention of replacement pilots hired after the unfair labor practice that the Court had found had been committed, was based at least in part on the equitable grounds that ALPA had not come into court with "clean hands" (Unprinted Tr. 2537-39). The Court said (Unprinted Tr. 2537-38): "in the Court's opinion, ALPA itself has not demonstrated its own good faith efforts toward settling the dispute to such a degree that it is now entitled to an equitable injunctive remedy that would require the discharge of the newly hired pilots," and at (Unprinted Tr. 2539), "in calling and conducting the

21/ The Court proceeding was instituted on November 3, 1960, and the Board's proceeding on July 22, 1960. Oral argument had been held before the Board on November 30, 1961, and the Court's opinion was issued on February 16, 1962. The Court's decision was on motions for summary judgment, and did not involve a full evidentiary hearing.

strike, ALPA was exercising its legal right. However, in now seeking a harsh remedy that would require discharge of the replacements, ALPA does not come into Court with clean hands."

In exercising its function to insure carrier compliance with the Railway Labor Act for the protection of the public interest, equitable considerations with respect to the conduct of the union are not controlling to the same extent that they are in private litigation. Rather, the Board's obligation is to the public, not other parties, and it is primarily to guard against disruption of air transportation resulting from needless or unlawful labor disputes. See, Western Air Lines v. Civil Aeronautics Board, 194 F. 2d 211 (C.A. 9, 1952).

And since the Board was acting pursuant to the authority specifically conferred in it by Section 401(k)(4) to enforce the Railway Labor Act, there is no basis for petitioners' assertions that the Board acted improvidently in dealing with a subject matter outside its jurisdiction.

Southern was free to negotiate some other contract, and the Board's guidelines were for future assessment by it of Southern's conduct in the event of necessity for further consideration by it.

22/ As the cited case indicates, it is these objectives and responsibilities which empower the Board to act in other labor matters such as imposing protective labor conditions on mergers.

23/ Accordingly, petitioners' reliance upon Burlington Truck Lines v. United States, 371 U.S. 156 (1962), is inapposite.

The Board had no choice other than to establish guidelines in its opinion if its order was to be effective for Section 401(g) purposes. The Board may not revoke a carrier's certificate for failure to comply with a condition until the carrier has intentionally failed to comply with a Board order directing compliance.^{24/} And, as previously indicated, Southern was not bound to accept the Board's order. Again, petitioners are urging points which are not theirs to make, but rather seek to stand in Southern's shoes and pursue the appeal which it dismissed.

Further, an analysis of the guidelines set forth in the opinion demonstrates that they merely define the minimum standards for future good faith bargaining rather than the dictation of the terms of an agreement. The Board stated, "we think the basis for settlement should be the 'advisory arbitration award' of Mediator Edwards accepted on July 28, 1960, by ALPA without qualification and by Southern with but two relatively minor reservations" (Tr. 2588). It is obvious that, the parties having agreed to almost all economic differences, reinserting the settled issues in future negotiations would not constitute good faith bargaining.

^{24/} It would not have been sufficient for the Board merely to direct Southern to commence bargaining in good faith, for a legitimate confusion on Southern's part as to what constituted good faith bargaining would prevent the Board from making a subsequent finding of intentional failure to comply (see Section 401(g), infra, pp. 50-51).

As to job retention, the Board said, on the basis of applicable law, that Southern would be entitled to retain the replacement pilots hired prior to July 12, 1960 (the date on which the Board found that the unlawful demands of Southern had caused an impasse which led to the break-off of negotiations), but must reinstate all striking pilots ^{25/} not replaced by pilots hired previous to that date. As to seniority, the Board said, again on the basis of applicable law, that Southern was not entitled to insist on forfeiture of seniority for the returning striking pilots, since to do so would, in all the facts and circumstances of this case, constitute an unfair labor practice. This latter guideline, the one chiefly challenged by petitioners, is subsequently shown to be correct.

^{25/} Having made unlawful demands which led to the breaking-off of negotiations and the consequent failure to settle and terminate the strike, Southern had lost its right to insist on retention of replacement pilots hired thereafter. NLRB v. Mackay R. & Tel. Co., 304 U.S. 333, 345 (1938) granted the right to insist on retention of replacement pilots only to employers, "guilty of no act denounced by the statute." The damage done by failure to reach a settlement at that time cannot be undone, but the Board's function in insuring future compliance must necessarily protect the rights of the striking pilots who would have been returned to work if the strike had been settled at the time the unlawful demands were made. As said by the Supreme Court in National Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940), "The public right and the duty [of the Board] extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the act. . . ." See also p. 43, infra. . . .

C. Petitioners were not indispensable parties to the Board's proceeding, nor is there any showing of conduct by ALPA which would invalidate the Board's orders

Under the Railway Labor Act, the carrier must bargain with the representative certified by the Mediation Board. That representative with respect to Southern was ALPA, and its status was not affected by ^{26/} the strike. That being so, Southern could comply with the Railway Labor Act only by bargaining with ALPA, and any contracts for permanent tenure with petitioners would not have relieved Southern of its duty to bargain with ALPA. Thus, the only necessary parties at ^{27/} most were ALPA and Southern. See National Licorice Co. v. NLRB, 309 U.S. 350 (1940); Semi-Steel Casting Co. of St. Louis v. NLRB, 160 F. 2d 388, 393 (C.A. 8, 1947), cert. denied, 332 U.S. 758 (1947); ^{28/} Oughton v. NLRB, 118 F. 2d, supra, at p. 495.

^{26/} As was said in Oughton v. NLRB, 118 F. 2d 486, 498-99 (C.A. 3, 1941), cert. denied, 315 U.S. 797 (1942):

"The Act prescribes no period of limitation to the continuity of a bargaining agent's majority status; and it is not easy to see how the courts may outlaw the choice of a bargaining agent freely made. After all, the selection of a representative for collective bargaining is a matter for the employees of an appropriate unit and for none other. . . . Until they take action, . . . to express a new choice, the continuity of the bargaining agent's majority must be presumed."

^{27/} Under Section 302.210 of the Board's Rules, formal complainants are parties to the administrative proceeding (see infra, p. 53).

^{28/} Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), cited by petitioners is not to the contrary, and does not support their contention. There, the NLRB ordered the employer to cease recognition of a union which the record clearly disclosed had been freely selected as bargaining agent by over 80 percent of the employees. The Court's concern was that the selection of a

(footnote continued)

This aspect of the case, we think, is squarely governed by National Licorice Co. v. NLRB, supra. The Court there rejected a contention that employees were necessary parties to a proceeding before the NLRB charging unfair labor practices, where the NLRB order had directed the employer to cease the enforcement of a contract made between the employer and substantially all the employees individually.

The Court said at 309 U.S. 366:

"As the National Labor Relations Act contemplates no more than the protection of the public rights which it creates and defines, and as the Board's order is directed solely to the employer and is ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal, we think they are not indispensable parties for purposes of the Board's order and the statute does not require their presence as parties to the present proceeding and there was no abuse of the Board's discretion in its failure to make them parties." 29/

bargaining agent by the majority of the employees should not be abrogated by an employer's unfair labor practices and the NLRB order, at least not without the hearing of the accredited bargaining agent. Here, there is no contention that the petitioners or any of them constituted an accredited bargaining agent.

Moreover, and apart from the fact that petitioners made no effort until after the settlement to displace ALPA as the bargaining agent, they concede (p. 12 of petitioners' brief) that as of July 12, 1960, the date upon which the Board found an unfair labor practice was committed by Southern, only 52 replacement pilots had been hired, as opposed to 137 pilots on strike (see attachment A to the back to work agreement (Tr. 2765-67)). Pilots hired subsequent to the date of the unfair labor practice could not affect the majority status of ALPA.

29/ If petitioners' contention were accepted, the Board would be faced with an impossible administrative task. Petitioners do not attempt to state which of them should have been made parties. If the Board joined all replacement pilots employed at the time of the commencement of the proceedings, as new pilots were hired, they also would have to be joined.

Nor do we perceive how petitioners' case is advanced by their assertions that, assuming they were not otherwise necessary parties, they were required to be joined in the Board's proceeding because ALPA failed in its duty to represent them. ALPA's demand was only that all of the pilots be given seniority from the date of their original hiring. The settled rule is that the statutory representative of a craft may make contracts which have unfavorable effects on some of the members represented, including such effects in terms of seniority, where the alleged discrimination is based upon relevant differences among the employees. Steele v. Louisville & N.R. Co., 323 U.S. 192, 203 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); Mount v. Grand International Brotherhood of Locomotive Engineers, 226 F. 2d 604, 607-08 (C.A. 6, 1955), cert. denied, 350 U.S. 967 (1956). Seniority based upon date of employment is a familiar concept (Ford Motor Co. v. Huffman, supra, 335 U.S. at 338 (1953)), and, as we subsequently show, petitioners in reality are insisting on discrimination in terms of superseniority in their favor (infra, pp. 36-39). Also, what petitioners are really arguing is that a union whose members are engaged in an economic strike must follow the self-defeating course of insuring that the strike is not successful through seeing to it that replacements are retained.

Finally on this point, it is obvious from the Board's opinion that petitioners' interests were known to the Board, and that Southern was vigorously championing the position that it was entitled to afford them superseniority. The argument in its ultimate analysis is no

more than one that the Board erred in its determination that Southern was not entitled to insist on this point, and again that petitioners are entitled to continue the litigation abandoned by Southern.

- D. The Board's findings that Southern had failed to bargain in good faith because of its insistence after July 12, 1960 on unlawful demands relating to discipline and seniority embody correct legal principles and are supported by substantial evidence

The Board found that Southern had not exerted every reasonable effort to settle the labor dispute between it and ALPA, and that Southern's demands had substantially contributed to the "hopeless impasse" in negotiations which occurred on July 12, 1960. This determination rested upon the Board's findings that the demands relating to disciplinary action were illegal per se and constituted improper coercion and an unwarranted interference with the striking employees' rights (Finding 5, Tr. 2590), that the demands relating to seniority were unlawful because they were unreasonable and unduly discriminatory against the striking employees (Finding 4, Tr. 2590), and that Southern's continued insistence on these demands as a condition for settlement constituted a failure to bargain in good faith (Finding 6, Tr. 2591). We discuss these findings separately.

1. The findings concerning discipline

Section 204 of the Railway Labor Act (infra, p.48) specifically provides that unsettled disputes growing out of grievances may be referred to an adjustment board. Petitioners do not dispute the Board's finding that Southern was not entitled to demand the right

to discipline the returning strikers for misconduct without regard to these statutory procedures relating to adjustments of grievances, and Southern plainly had no such right.^{30/} Furthermore, the record makes it perfectly clear that Southern's demand was intended to deprive the striking pilots of this statutory benefit in that Southern feared that it otherwise might be unable "to obtain the result" that it wanted with particular employees.^{31/} If ALPA had acceded to this demand of Southern's, Southern would have had the right, in its unfettered discretion, to take reprisals against such of the striking union employees as it saw fit, and for whatever conduct it saw fit. In these circumstances, the Board properly could conclude that Southern's insistence on a waiver by the strikers of their statutory rights was designed to coerce them against protected activities in that the striking pilots would fear future reprisals, and that the

^{30/} The procedures of Section 204 of the Railway Labor Act are compulsory. Cf. Union Pacific Railroad Co. v. Price, 360 U.S. 601 (1959); Railroad Trainmen v. Chicago R.&I. R. Co., 353 U.S. 30 (1957).

Strikers who have been replaced retain a status of striking employees and are entitled to the benefits of the procedures which are required to be established pursuant to Section 204 of the Railway Labor Act. NLRB v. Carlisle Lumber Co., 94 F. 2d 138, 144 (C.A. 9, 1937), cert. denied, 304 U.S. 575 (1938); Jeffery-DeWitt Insulator Co. v. NLRB, 91 F. 2d 134, 136-37 (C.A. 4, 1937), cert. denied, 302 U.S. 731 (1937).

^{31/} Graydon Hall, the vice-president of Southern who attended the negotiations at which the demand was made, testified that the proposal was intended to avoid the grievance procedures because such procedure "is oftentimes a lengthy and very oftentimes unsatisfactory solution to the Company's problem," in that "you are not able to obtain the result that you might want with the particular employee," because if the matter were submitted to a neutral arbitrator he may decide against the Company (Tr. 945-46).

making and insistence upon this demand was a failure to exert every reasonable effort to make and maintain an agreement with ALPA.

2. The findings concerning seniority

The petitioners' contentions that the Board erred in finding that Southern's demand relating to seniority was unlawful is based on two erroneous assumptions. The first (petitioners' brief, pp. 19-21) is that NLRB v. Potlatch Forests, 189 F. 2d 82 (C.A. 9, 1951) and the other cases cited by petitioners, hold that employers have an unqualified right to insist on any form of a "superseniority" policy, regardless of the circumstances, and the second (petitioners' brief, pp. 21-22) is that the Board held that a promise of permanent employment was a "sine qua non" for an employer to legitimately demand a right to impose a "superseniority" policy. But insistence upon superseniority can constitute an unfair labor practice in many circumstances; the Board's findings were that Southern's insistence in the circumstances of this case did represent unlawful discrimination; and the question of whether Southern considered that it had made commitments to the replacements of permanent employment was merely one aspect of the over-all factual complex.

The Potlatch case upon which petitioners rely held only that an employer has the right to grant replacement employees only that preferential seniority over strikers which is "reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers', to the extent that such seniority policy will insure permanent tenure

against future economic lay-offs (189 F. 2d at 85, 86). But the courts of appeals have consistently sustained the NLRB's finding of an unfair labor practice where the evidence did not sustain the conclusion that a preferential seniority policy was motivated solely to protect and continue an employer's business. Olin Mathieson Chemical Corp. v. NLRB, 232 F. 2d 158 (C.A. 4, 1956), aff'd per curiam, 352 U.S. 1020 (1957); NLRB v. Calif. Date Growers Assoc., 259 F. 2d 587 (C.A. 9, 1958); Ballas Egg Products, Inc. v. NLRB, 283 F. 2d 871 (C.A. 6, 1960); Swarco, Inc. v. NLRB, 303 F. 2d 668 (C.A. 6, 1962), petition for certiorari filed August 14, 1962, Case No. 335, 31 L.W. 3081.

The Board specifically accepted "the rationale of Potlatch and similar cases that under certain circumstances superseniority may be a 'benefit reasonably appropriate for an employer to bestow in attempting 'to protect and continue his business' ! ", but concluded that it could not "find Southern's demand relating to superseniority to be warranted by the circumstances disclosed by the record"

32/ The other cases cited by petitioners are even more restrictive in supporting the right of an employer to insist upon the imposition of a preferential seniority policy. International Union of Electrical R.&M. Workers v. NLRB, 303 F. 2d 359, 364 (C.A. 3, 1962), cert. granted sub nom. NLRB v. Erie Resistor Corp., 371 U.S. 810 (1962), argument February 18-19, 1963, held only that the NLRB could not find a preferential seniority policy unlawful per se, regardless of motivation. NLRB v. Lewin-Mathes Co., 285 F. 2d 329, 333 (C.A. 7, 1960) held only that a superseniority policy might be justified where the replacements had insisted upon such a condition before accepting employment, and where the replacements were other employees of the employer, who were transferred from other jobs, after the employer had been unable to obtain outside replacements.

(Tr. 2579-80). Rather, the Board concluded that "considering the important effect which a pilot's seniority has upon various aspects of his employment status and working conditions, the extreme nature of the Southern demand forces the conclusion that an element of punitive motive and desire to discourage Union activities, as opposed to protection of Southern's legitimate business interests or any holding out or concern for the replacements, is present" (Tr. 2578). The Board specifically noted that the discrimination against strikers resulting from Southern's demand went much farther than the limited discrimination of the preferential seniority policy sustained in Potlatch (Tr. 2578 at n. 36).

The record clearly sustains the Board's conclusion that the extreme nature of Southern's demand, requiring forfeiture of all accrued seniority of the striking pilots, was inherently so discriminatory against the striking pilots, that it went far beyond the scope of any right to impose a superseniority policy which has been sustained by any court. The record is clear that the demand was for forfeiture by the strikers of all seniority accrued over many years of loyal service.^{33/} The contract between ALPA and Southern, as it stood prior to negotiations, provided that pilots' base pay (Sections 3(a), 12(a)(b), 13(c), Unprinted Tr. 1411,

^{33/} If there is any doubt as to the meaning of the July 12 demand that, "Strikers returning to work will take seniority list as it now is" (Tr. 1817), all doubt as to meaning was removed by Southern's response to the Mediators' arbitration proposal on July 28, 1960 which provided that the seniority of the returning strikers "will date from the date on which they return to work" (Tr. 1825).

1414-15), vacations (Section 18(1)(2), Unprinted Tr. 1418-19), and right to job assignments (Sections 30(B)(2), 30(D)(3), 30(E)(2), Unprinted Tr. 1426-28) would all be determined on the basis of seniority. ^{34/} There is no evidence that Southern proposed any change in the customary industry practice of determining these benefits on a seniority basis. Rather, Southern sought to deny the strikers the benefits of seniority, by computing their length of service from the date they returned to work.

The Board order did not make a promise of permanent employment a "sine qua non" for the exercise by Southern of its right, by means of a preferential seniority policy, to insist that the replacement pilots be insured permanent tenure against future economic lay-offs. On the contrary, the Board found that the demand of Southern was so extreme and so far beyond protecting the replacements for job retention purposes, as to force the conclusion that Southern must have been motivated in making its demand by a desire to punish and discriminate ^{35/} against the striking employees (Tr. 2577-78). Nevertheless, the Board examined the evidence in the record to determine if there

^{34/} Whether or not the contract was considered as terminated, this did not entitle Southern to discriminate against the strikers in respect to these basic rights. NLRB v. Waterman S.S. Corp., 309 U.S. 206, 218 (1940), rehearing denied 309 U.S. 696 (1940).

^{35/} The Supreme Court has held in Radio Officers Union v. NLRB, 347 U.S. 17, 44-45 (1954) that specific evidence of an intent to discourage union activity is not necessary, but that if an employer's action has the consequence of discouragement it is presumed that he intended such consequences. See also, Swarco, Inc. v. NLRB, 303 F. 2d 668 (C.A. 6, 1962).

could be any basis for a conclusion that Southern was justified in making such an extreme demand by its desire to protect and continue its business. The Board quite correctly concluded that the record did not disclose any such justification. One of the factors which supported this conclusion was the fact that Southern's officers and employees testified that no commitments had been made to the replacement pilots regarding permanency of employment or seniority. In fact, the only testimony on the part of Southern's witnesses which attempted any justification of Southern's demand that the strikers forfeit their seniority was given by Graydon Hall, the vice-president of Southern, who attended the negotiations at which the demand was made. When pressed on the purpose of the demand during cross-examination, he testified that, "We made this proposal here because the Union had made the exact opposite proposal" (Tr. 943).

Petitioners' answer to the evidence on this subject (Br., p. 22) is merely that the record does not affirmatively establish that the replacement pilots were not promised permanent employment or seniority by Southern. However, to the extent that any such promises might have been thought to constitute a justification for Southern's demands, it is only reasonable to assume that Southern would have affirmatively established them. It did not. On the contrary, as previously noted,

^{36/} William MaGill, vice-president in charge of operations for Southern, testified that he did not know of any commitments to replacement pilots in regard to superseniority and should have known if such commitments were given (Tr. 862-63). Edward Martin, personnel director of Southern, who did the actual hiring, testified that he did not make any commitment to the replacement pilots as to duration of employment or as to preferential seniority (Tr. 1018-19).

the testimony of the man who did the hiring was that there were no commitments as to duration or seniority (Tr. 1018-19).^{37/} The problem thus was one of assessing Southern's motivation in making its extreme demands unhampered by any actual commitments in these respects by Southern. While Southern desired to accord preferential treatment to the replacements, its demand actually was for the forfeiture of the strikers' seniority rather than mere protection of the replacements through a desire to protect and continue its business. The record supports no other inference with respect to Southern's motivation.

3. The findings that Southern's insistence on its demands constituted a failure to bargain in good faith

The Board concluded that by July 12, 1960 (after 8 months of negotiations and mediations) the parties had reached near agreement on the economic issues. At that point, settlement was not only possible but likely (Tr. 244-45, 421, 433). However, on July 12, 1960, Southern made its unlawful demands as a result of which settlement became impossible.^{38/} Although ALPA made it perfectly clear

^{37/} Further, petitioners fail to distinguish between the various phases of the labor controversy and what the Board did and did not do with respect to job tenure and seniority. Whatever Southern may have promised persons hired after July 12, 1960 would have been irrelevant, since that was the date on which the unfair labor practices occurred as a result of which Southern lost its right to insist on retention of the replacements. As to persons hired between June 5 and July 12, 1960, the Board explicitly held that Southern properly could insist that they be given permanent tenure. The record shows no commitment of superseniority.

^{38/} The record shows that Mr. McMurray, on behalf of ALPA, met on July 12, 1960, with Southern's negotiators for two to three hours after Southern had made its demands, in an attempt to get Southern to modify them, but that Southern would not modify its demands, and never

(footnote continued)

that it could not accede to Southern's demands (Tr. 436, 938-39), Southern did not indicate any willingness to modify its demands even when faced with final break-off of negotiations. It is possible, of course, that had Southern modified its demands to conform to the permissible limits of the Railway Labor Act, ALPA might not have acceded to them, just as it is possible that, had ALPA first modified its position, Southern might have retreated from its demands.

These matters rest in the area of speculation, and no one can say when the strike would have been settled had different positions been taken during the negotiations. But in making and maintaining illegal demands, Southern prevented any discussion or negotiations

indicated other than the replacements "would stay in there and at the top of the list" (Tr. 393-94, 435-36). Mr. Phillips (Southern's attorney at the negotiations) testified that he suggested, but did not discuss or offer, that only the probationary striking pilots would be replaced (Tr. 1333-35). While there was a subsequent meeting on July 21, 1960, the discipline and seniority issues remained an insuperable obstacle, and the economic issues were not discussed. Southern's continued insistence on its demands was demonstrated by a repetition of them without modification in its July 28, 1960 response to the Mediators' Advisory Arbitration Proposal, the last communication between the parties (Tr. 1825).

Thus, while there were meetings between the parties subsequent to July 12, 1960, and while minor economic issues appear to have been finally resolved as a formal matter at the July 28, 1960 meeting, the Board reasonably concluded that, had the July 12, 1960 impasse not occurred, the strike could have been settled at that time. Consequently, we think that the Board's selection of the date of July 12, 1960 as the date on which Southern's conduct converted the strike into an unfair labor practice strike was correct, rather than July 28, 1960 as suggested by petitioners (Br., p. 15). In NLRB v. Erie Resistor Corp., 132 N.L.R.B. 621 (see, International Union of Electrical R.&M. Workers, supra), the NLRB after finding the company's seniority policy unlawful per se, ordered reinstatement of the strikers not replaced prior to the date the seniority policy of the company was communicated to the union.

as to any legitimate demands which it might have made, and thereby failed to bargain in good faith as required by the Railway Labor Act.

NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958); Douds v. International Longshoremen's Ass'n, 241 F. 2d 278 (C.A. 2, 1957).^{39/} There can be no doubt, therefore, that Southern's illegal demands were at least a contributing factor to the failure to reach a settlement and the prolongation of the strike. As a result, the strike became an unfair labor practice strike and all striking pilots who had not been replaced prior to July 12, 1960, the date the impasse resulting from Southern's unlawful demands occurred, were entitled to reinstatement.

NLRB v. Pecheur Lozenge Co., 209 F. 2d 393, 404-05 (C.A. 2, 1953), cert. denied, 347 U.S. 953 (1954); General Drivers and Helpers Union v. NLRB, 112 U.S. App. D.C. 323, 302 F. 2d 908, 911 (1962), cert. denied 371 U.S. 827 (1962); see also, NLRB v. Wichita Television Corp., 277 F. 2d 579, 584 (C.A. 10, 1960), cert. denied, 364 U.S. 871 (1960). And this is so even if Southern's unlawful conduct was only the concededly illegal demand for the unreviewable right to discipline the striking pilots, with its resultant coercive effect against protected union activities through fear of future reprisals.^{40/}

^{39/} An act which constitutes failure to bargain in good faith under the National Labor Relations Act is equivalent to failure to exert every reasonable effort to make and maintain an agreement under Section 2 of the Railway Labor Act, Trainmen v. Toledo P.&W. R. Co., 321 U.S. 50, 61, n. 18 (1944); American Airlines, Inc. v. ALPA, 169 F. Supp. 777, 793-94 (S.D.N.Y. 1958).

^{40/} Apart from the question of good faith bargaining, this demand, because of its coercive effect against union activity, would itself constitute a violation of Section 2 of the Railway Labor Act, and would convert the strike into an unfair labor practice strike. Texas N.O. R. Co. v. Railway Clerks, 281 U.S. 548 (1930); NLRB v. Guistina Bros. Lumber Co., 253 F. 2d 371, 374 (C.A. 9, 1958).

- 44 -

CONCLUSION

The petition for review should be dismissed or in the alternative
the Board's orders should be affirmed.

Respectfully submitted,

LEE LOEVINGER,
Assistant Attorney General,

JOSEPH B. GOLDMAN,
Deputy General Counsel,

O. D. OZMENT,
Associate General Counsel,
Litigation and Legislation,

PETER B. SCHWARZKOPF,
Attorney,
Civil Aeronautics Board.

LIONEL KESTENBAUM,
GERALD KADISH,
Attorneys,
Department of Justice.

JOHN H. WANNER,
General Counsel,
Civil Aeronautics Board.

February, 1963

APPENDIX

The relevant provisions of the Railway Labor Act (44 Stat. 577, as amended) are:

TITLE I

* * * * *

General Purposes

Sec. 2. [44 Stat. 577, as amended by 48 Stat. 1168, 45 U.S.C. 151a, 152] The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretations or application of agreements covering rates of pay, rules, or working conditions.

General duties - Duty of carriers and employees to settle disputes

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * * *

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to

the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representatives of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * * *

TITLE II

Application of sections 151, 152, and 154-163 to carriers by air

Sec. 201. [49 Stat. 1189, 45 U.S.C. 181] All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Same; duties, penalties, benefits, and
privileges

Sec. 202. [49 Stat. 1189, 45 U.S.C. 182] The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee," respectively, in section 1 thereof.

* * * * *

System, group, or regional boards of adjustment

Sec. 204. [49 Stat. 1189, 45 U.S.C. 184] The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group or carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

* * * * *

The relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 et seq.) are:

DECLARATION OF POLICY: THE BOARD

Sec. 102. [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

- (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
- (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
- (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
- (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
- (e) The promotion of safety in air commerce; and
- (f) The promotion, encouragement, and development of civil aeronautics.

* * * * *

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * * * *

Terms and Conditions of Certificate

(e)(1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

(2) A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States.

(3) A certificate issued under this section to engage in supplemental air transportation shall designate the terminal and intermediate points only insofar as the Board shall deem practicable and otherwise shall designate only the geographical area or areas within or between which service may be rendered.

(4) No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d)(3) of this section.

(5) No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate.

(6) Any air carrier, other than a supplemental air carrier, may perform charter trips or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board.

* * * * *

Authority to Modify, Suspend, or Revoke

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply,

within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

* * * * *

Compliance With Labor Legislation

(k)(1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with decision numbered 83 made by the National Labor Board on May 10, 1934, notwithstanding any limitation therein as to the period of its effectiveness.

(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within a Territory or possession of the United States, the minimum of which shall be not less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

(3) Nothing herein contained shall be construed as restricting the right of any such pilots or copilots or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

(5) The term "pilot" as used in this subsection shall mean an employee who is responsible for the manipulation of or who manipulates the flight controls of an aircraft while under way including takeoff and landing of such aircraft, and the term "copilot" as used in this subsection shall mean an employee any part of whose duty is to assist or relieve the pilot in such manipulation, and who is properly qualified to serve as, and holds a currently effective airman certificate authorizing him to serve as, such pilot or copilot.

* * * * *

COMPLAINTS TO AND INVESTIGATIONS BY THE ADMINISTRATOR
AND THE BOARD

Filing of Complaints Authorized

Sec. 1002. [72 Stat. 788, 49 U.S.C. 1482] (a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. . . .

Investigations on Initiative of Administrator or Board

(b) The Administrator or Board, with respect to matters within their respective jurisdictions, is empowered at any time to institute an investigation, on their own initiative, in any case and as to any matter or thing within their respective jurisdictions, concerning which complaint is authorized to be made to or before the Administrator or Board by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Administrator or the Board shall have the same power to proceed with any investigation instituted on their own motion as though it had been appealed to by complaint.

Entry of Orders for Compliance With Act

(c) If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith.

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator subject to Review

Sec. 1006. [72 Stat. 795, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

The relevant provisions of Civil Aeronautics Board Regulations

are:

PART 302 - RULES OF PRACTICE IN ECONOMIC PROCEEDINGS

Subpart A - Rules of General Applicability

* * * * *

302.14 (14 C.F.R. 302.14) Participation in hearing cases by persons not parties. * * *

(b) Participation in hearings. Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the examiner or the Board, if the hearing is held by the Board, such

person may also cross-examine witnesses directly. Such persons may also present to the examiner a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing.

302.15 (14 C.F.R. 302.15) Formal Intervention.

(a) Who may intervene. (1) Any person who has a statutory right to be made a party to a proceeding shall be permitted to intervene therein.

(2) Any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business may be permitted to intervene in any proceeding.

(b) Considerations relevant to determination of petition to intervene. In passing upon a petition to intervene, the following factors, among other things, will be considered: (1) The nature of the petitioner's right under the statute to be made a party to the proceeding; (2) the nature and extent of the property, financial or other interest of the petitioner; (3) the effect of the order which may be entered in the proceeding on petitioner's interest; (4) the availability of other means whereby the petitioner's interest may be protected; (5) the extent to which petitioner's interest will be represented by existing parties; (6) the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and (7) the extent to which participation of the petitioner will broaden the issue or delay the proceeding.

* * * * *

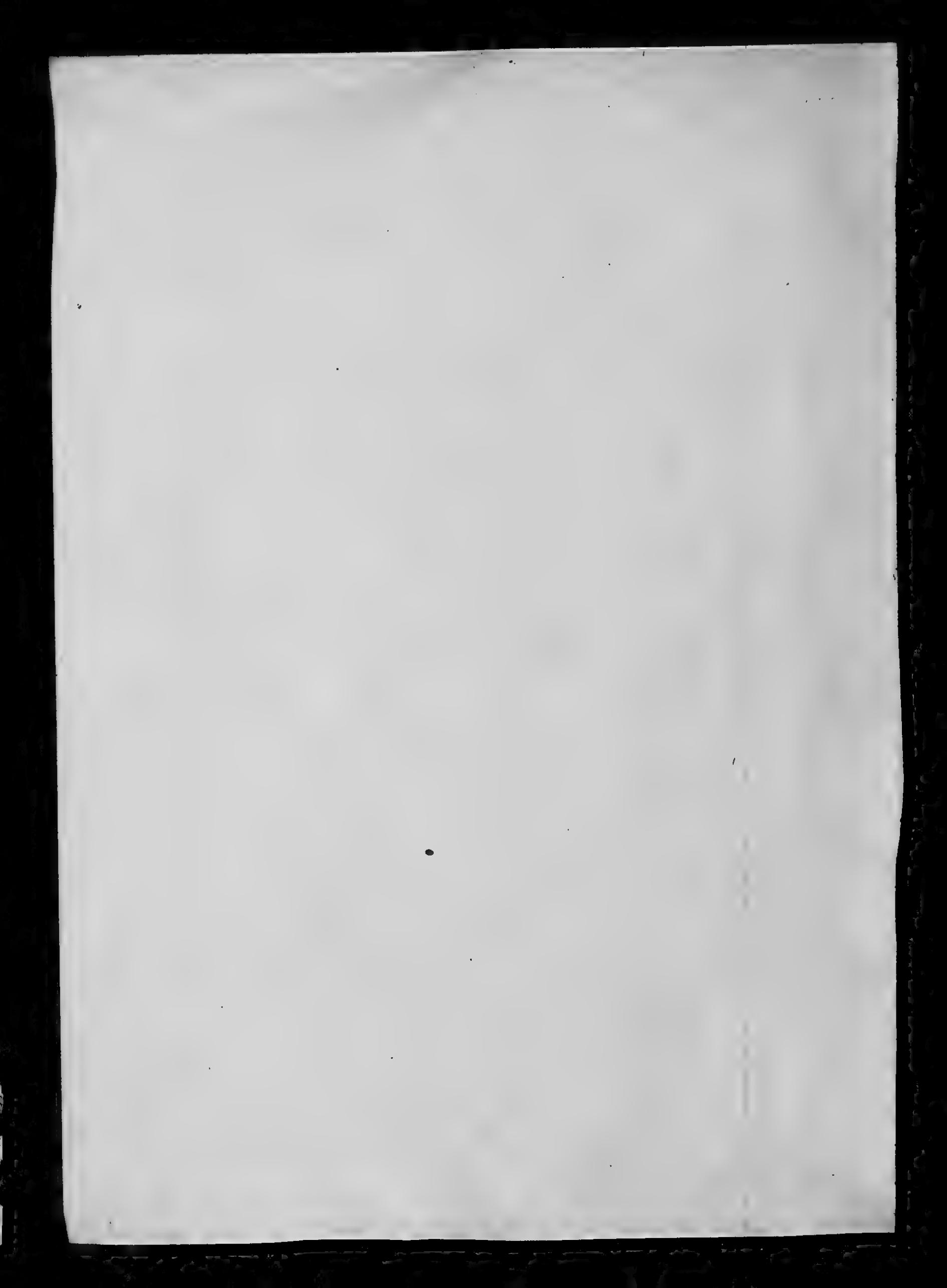
Subpart B - Rules Applicable to Economic
Enforcement Proceedings

* * * * *

302.210 (14 C.F.R. 302.210) Parties.

The parties to an economic enforcement proceeding shall be the Board (represented by an enforcement attorney), the respondent, any person whose formal complaint alleged violations which were later covered by the petition for enforcement, and any other person permitted to intervene pursuant to § 302.15.

* * * * *



REPLY BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, ET AL.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

AIR LINE PILOTS ASSOCIATION,

Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 12 1963

Nathan J. Paulson
CLERK

PHILIP F. HERRICK
NICHOLAS E. ALLEN
1001 15th Street, N.W.
Washington, D.C.
Attorneys for Petitioners

Of Counsel:

JOHN B. KNEIPPLE



INDEX

	<u>Page</u>
PRELIMINARY STATEMENT	1
ARGUMENT	2
I. The Collective Bargaining Agreement Entered Into Between Southern and ALPA Has Not Rendered the Board's Orders Moot	2
II. The Petition Herein Was Timely Filed	3
III. The Board Did Not Have Jurisdiction to Entertain and Decide ALPA's Complaint or to Issue the Orders Under Review	6
IV. The Board's Orders Improperly Dictated Terms of the Southern-ALPA Agreement and Were Improvidently Issued	9
V. Petitioners, or Some of Them, Were Indispensable Parties to the Proceedings Before the Board and the Failure to Make Them Parties Invalidates the Proceedings	10
VI. ALPA's Failure to Represent or to Assure the Representation of Petitioners Invalidates the Board's Proceeding	13
VII. The Board's Findings that Southern Failed to Bargain in Good Faith Are Not Supported by the Record	14

TABLE OF CITATIONS

Cases:

ALPA v. Southern Airways, C.A. No. 2982, D.C. M.D. Tennessee	16
American World Airways v. Flight Engineers Int'l., 306 F.2d 840 (C.A. 2d, 1962)	8
Ballas Egg Products, Inc. v. N.L.R.B., 283 F.2d 871 (C.A. 6th, 1960)	16
Brotherhood of Locomotive Engineers v. B. & O. R. Co., ____ U.S. ___, decided March 4, 1963 (31 Law Week B.N.A. 4240)	9
Burlington Truck Lines v. U.S., 83 S.Ct. 239	10
Burrell v. Martin, 98 U.S. App. D.C. 33, 232 F.2d 33 (1955)	2
Consolidated Edison Company v. N.L.R.B., 305 U.S. 197	12
Elgin J. & E. R.R. Co. v. Burley, 325 U.S. 711, rehearing 327 U.S. 661	9

	<u>Page</u>
Federal Power Commission v. Idaho Power Co., 344 U.S. 17, 97 L.Ed. 15 (1952)	4
Flight Engineers Int'l. v. Eastern Air Lines, 208 F.Supp. 182 (D.C. S.D. N.Y., 1962), aff'd 307 F.2d 510 (C.A. 2d, 1962)	8, 9
Holman et al. v. Southern Airways, Inc. and ALPA, D.C. N.D. Ga., C.A. No. 8131, 1962	3
Holman et al., Appellants v. Southern Airways, Inc., and ALPA, Appellees, No. 20181, C.A. 5th	3
J. I. Case Co. v. N.L.R.B., 321 U.S. 332 (1944)	2
N.L.R.B. v. California Date Growers Association, 259 F.2d 587 (C.A. 9th, 1958)	16
N.L.R.B. v. Cowell Portland Cement Co., 108 F.2d 198 (C.A. 9th, 1939)	12
N.L.R.B. v. Mackay Radio & Telegraph Co., 304 F.2d 333	15, 16
N.L.R.B. v. Potlatch Forests, 189 F.2d 82	16
National Licorice Co. v. N.L.R.B., 309 U.S. 350	11
Olin Mathieson Chemical Corporation v. N.L.R.B., 232 F.2d 158 (C.A. 4th, 1956)	16
Oughton v. N.L.R.B., 118 F.2d 486	11
Outland v. CAB, 109 U.S. App. D.C. 90, 284 F.2d 224	5
Pan American World Airways v. Flight Engineers Int'l., 306 F.2d 840	9
Semi-Steel Casting Co. v. N.L.R.B., 160 F.2d 388	11
Steele v. L. and N.R. Co., 323 U.S. 192	14
Swarco, Inc. v. N.L.R.B., 303 F.2d 668 (C.A. 3rd, 1962)	16
Texas & N.O. R. Co. v. Brotherhood, 281 U.S. 548	7
Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515	8
 <u>Statutes:</u>	
Civil Aviation Act of 1938: Sec. 401(1)(4), 61 Stat. 141	7

(iii)

	<u>Page</u>
Federal Aviation Act of 1958:	
Sec. 401(g), 72 Stat. 754, 49 U.S.C. 1371(g)	10, 11
Sec. 401(k)(4), 72 Stat. 754, 49 U.S.C. 1371(k)(4)	6, 7
Sec. 1002(c), 72 Stat. 788, 49 U.S.C. 1482(c)	6
Sec. 1006(a), 72 Stat. 795, 49 U.S.C. 1486	5
Sec. 1006(e), 72 Stat. 795, 49 U.S.C. 1486(e)	4, 13
Sec. 1006(g), 72 Stat. 795, 49 U.S.C. 1486(a)	5, 8
Railway Labor Act:	
Title II, 49 Stat. 1189, 45 U.S.C. 181	10, 11



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, ET AL.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

AIR LINE PILOTS ASSOCIATION,

Intervenor.

**ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD**

REPLY BRIEF FOR PETITIONERS

PRELIMINARY STATEMENT

By their amended petition, accepted for filing February 7, 1963, petitioners seek review of an additional order of the Board, No. E-19162, issued January 3, 1963 (Tr. 2779). The issues with respect to this latest

order are essentially the same as the issues dealt with in the brief for petitioners filed January 11, 1963. Therefore, petitioners request the Court to consider that brief as addressed to the new order.

ARGUMENT

I. The Collective Bargaining Agreement Entered into Between Southern and ALPA Has Not Rendered the Board's Orders Moot.

Mootness does not exist under the circumstances of this case because the Board's orders have continuing effect and the relief which petitioners seek would be effectual if granted.

In Burrell v. Martin, 98 U.S. App. D.C. 33, 232 F.2d 33 (1955), this Court quoted with approval the following definition (p. 37):

"A moot case has been defined as . . . one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." [Ex parte Steele, 162 F. 694 (1908)]

In J. I. Case Co. v. N.L.R.B., 321 U. S. 332 (1944), the Labor Board sought enforcement of an order directed by it to an employer to bargain upon request and to cease giving effect to conflicting individual contracts with its employees. While the court proceedings were pending, the parties negotiated a collective agreement and the individual contracts expired. The Supreme Court considered the question of mootness and concluded that the case was not moot "in view of the continuing character of the obligation imposed by the order."

A similar situation is presented here. The Board's orders clearly do have continuing effect. The Board has expressly reserved a continuing jurisdiction. Actions of the Courts in the Fifth Circuit, to date,

indicate that petitioners cannot obtain relief there as long as the Board's orders remain in effect.¹

This Court has jurisdiction to grant the relief prayed, and if such relief is granted, it is apparent that this will have the practical consequence of clearing the way for an adjudication of petitioners' claim for relief in the 5th Circuit.

Petitioners submit, therefore, that this appeal is not rendered moot by the Southern - ALPA agreement.

II. The Petition Herein Was Timely Filed.

The second of the orders which are the subject of this review was issued August 27, 1962, and the petition was filed in this Court on October 26, 1962. This was within the 60-day period provided by the statute (Section 1006(a), Federal Aviation Act). This second order, it should be noted, provided for the first time that pilots reinstated under the Board's first order must be given seniority over replacement pilots who were hired prior to July 12, 1960.² As to the replacement pilots in this group, this was the first adverse adjudication by the Board.

¹ The District Court in Georgia, in dismissing petitioners' suit for injunction said:

"... in the face of the expressed intention of the Congress to vest exclusive jurisdiction in the various Courts of Appeals to review orders of the Civil Aeronautics Board, this Court feels that any relief, injunctive or otherwise, must be had from such Courts of Appeals or from the administrative agency in whose jurisdiction the proceedings originated — in this case the Civil Aeronautics Board."

Opinion, Holman et al. v. Southern Airways, Inc. and ALPA, D.C. N.D. Ga., Civil Action No. 8131, Nov. 9, 1962, p. 9 (Tr. 2755).

The Fifth Circuit Court of Appeals, on January 23, 1963, issued an order as follows:

"As the case involves matters related to those in the appeal pending in the Court of Appeals for the District of Columbia, it is ordered that pending further orders of this Court the above appeal is held in abeyance." (Holman et al., Appellants v. Southern Airways, Inc., and ALPA, Appellees, Docket No. 20181.)

² As noted in petitioners' original brief, p. 15, this key date actually was July 28, 1960, by which time a greater number of replacement pilots had been hired.

In Federal Power Comm'n. v. Idaho Power Co., 344 U. S. 17, 97 L. Ed. 15 (1952), cited in the Board's brief (p. 16), the Supreme Court held that a second judgment of this Circuit, which modified an order of the Federal Power Commission by striking a condition from the term of the order, started anew the time for petitioning for certiorari, the period for certiorari following this Court's first judgment having long since expired. In an annotation following the report of this decision, the principles involved are summarized as follows (97 L. Ed. 255, 256):

"Whether the time for taking review proceedings starts to run from the original judgment or from its amendment generally depends upon whether the amendment modifies the original judgment in matters of substance. The test is whether the later judgment has disturbed or revised legal rights and obligations which, by the prior judgment, had been plainly and properly settled with finality. Federal Trade Com. v. Minneapolis-Honeywell Regulator Co., (1952) 344 U. S. 206, 97 L. Ed. 245, 73 S.Ct. 245.

"Where a judgment, order, or decree is amended or modified in any substantial or material aspect, the time within which appellate review may be sought in a Federal court runs from the date of the amendment or modification." (Citing cases)

Under these well-settled principles, it must be held that the Board's second order was a new adjudication as to the replacement pilots hired prior to July 12, 1960, and therefore that as to them, at least, the petition for review was unquestionably timely.

Inasmuch as the petition was filed within time as to the second order, the contentions of the Board and ALPA on this point necessarily are addressed to the first order, which was issued July 5, 1962.³

³ Petitioners do not contend their amended petition, seeking review of the Board's third order, No. E-19162, issued January 3, 1963, removes the objection as to timeliness with respect to the first order. They do contend, however, that the third order removes from consideration on this appeal the objections raised by the Board and ALPA in their motions to dismiss the petition and in their briefs on this appeal that petitioners failed to exhaust their administrative remedies or to comply with Section 1006(e) of the Act (Board's Motion to Dismiss (dated 11/19/62); ALPA's Motion to Dismiss (dated 12/3/62); Board's brief, p. 18; ALPA's brief, pp. 18, 27, 35).

In Outland v. Civil Aeronautics Board, 109 U.S. App. D.C. 90, 284 F.2d 224 (1960), this Court held that a petition for judicial review of an order of the Board was timely when it was filed within 60 days after denial by the Board of a timely petition for reconsideration. Part of the rationale for the decision is that "there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary."

The Board's order of August 27, 1962, was in response to a petition by Southern for clarification of the earlier order. Though this is not identical with a request for reconsideration, the two are analogous, and the rationale of Outland is applicable in the present situation. Conceivably the Board's order of July 5, 1962, might have been modified in such a way as to make judicial review unnecessary.

Even if it be determined that a timely filing with respect to the second order does not render the first order subject to review, Section 1006(a) of the Federal Aviation Act permits this Court to waive the requirement upon a showing of reasonable grounds for failure to timely file. It is respectfully submitted that petitioners' situation in this case shows very compelling grounds for the invocation of a waiver. As has been noted, they were not parties to the Board proceeding. They were never served with notice. They had received repeated assurances from Southern that they would not be replaced by returning strikers. Southern advised them, soon after issuance of the order, that it was taking an appeal from the order. Southern did so, but on September 21, 1962, without any forewarning to petitioners, Southern entered into the agreement with ALPA which was in derogation of petitioners' employment rights, and it also agreed to dismiss its appeal. This was already more than 60 days after the July 5 order. Petitioners then moved with diligence to pursue their legal remedies, including this appeal.⁴

⁴ See affidavits of Holman (dated 11/15/62), Dossey (dated 11/19/62), Ledbetter (dated 11/17/62), Hunt (dated 11/17/62), Fleming (dated 11/18/62), Aull (dated 11/21/62), Olson (dated 11/21/62), and Hoyt (dated 11/21/62) filed in support of petitioners' motion for stay herein (dated 11/13/62).

In the event that this Court should determine that the petition for review was not timely filed as to any of the Board's orders, petitioners repeat the request heretofore made in their answer to the Board's motion to dismiss, that the Court exercise its discretion and receive the petition.⁵

III. The Board Did Not Have Jurisdiction to Entertain and Decide ALPA's Complaint or to Issue the Orders Under Review.

The Board and ALPA, in their briefs, contend that the Board's actions and orders in this case are supported by the language, the history, and the administration of the Federal Aviation Act.

They correctly point out (Board's brief, pp. 18-20, ALPA's brief, p. 18) that the Act requires an air carrier's compliance with Title II of the Railway Labor Act (401(k)(4)), that it authorizes the Civil Aero-nautics Board to suspend or revoke the certificate of an air carrier who violates an order of the Board directing compliance (401(g)), and that it empowers the Board to issue such an order when, after notice and hearing, the Board finds the carrier has failed to comply with some provi-sion of the Act (1002(c)). But Section 1002(c) confers this power only "with respect to matters within their jurisdiction."

Whether ALPA's complaint against Southern is such a matter, "within their [the Board's] jurisdiction," is the basic question before the Court in this appeal. ALPA says the statutory language referred to above is "plain and unambiguous" (ALPA's brief, p. 18), but the Board said in its initial decision that its role "in the enforcement of obligations placed on air carriers by the Railway Labor Act is unsettled." (Tr. 2564) This acknowledged unsettled state of the law is due in large measure to the lack of clarity in the above provisions of the Federal Aviation Act.

⁵ Petitioners' answer to the Board's Motion to Dismiss (dated 12/4/62), pp. 7, 10.

Nor does the legislative history support the broad jurisdiction now claimed by the Board and ALPA. This history shows that Title II of the Railway Labor Act was added in 1936 to include air carriers and their employees because Congress was satisfied with the experience in the field of rail transportation and desired the same means of settling disputes in air transportation (except with respect to settlement of grievances under Section 3).⁶ The Civil Aeronautics Act was enacted in 1938, including as Section 401 (1)(4) the provision, similar to 401 (k)(4) of the Federal Aviation Act of 1958, requiring compliance with Title II of the Railway Labor Act. But there is nothing in the legislative history of either of these later acts which indicates Congress intended a change of policy relative to administration and enforcement of the Railway Labor Act.

Statements of a proponent (ALPA's president, Behncke) and an opponent (Air Transport Association's president, Gorrell) during committee hearings on a proposal which led, ultimately, to the provisions of Section 401 (1)(4) (now 401 (k)(4)) are referred to by the Board and ALPA in their briefs in support of the broad jurisdiction they contend for (Board's brief, pp. 21-24, ALPA's brief, pp. 31-33). A principal objective, those references show, however, was to insure that air carriers' foreign operations would be subject to the Railway Labor Act's requirements. After further consideration, the proposal was modified and included in the bill, but without any Congressional expression of intent to confer on the Civil Aeronautics Board power to hear and determine the merits of unfair labor practice complaints.

This history also must be considered in the light of the Supreme Court's decisions which, prior to 1938, had established the roles of the courts and of administrative agencies under the Railway Labor Act. As shown by Texas & N. O. R. Co. v. Brotherhood, 281 U. S. 548 (1930),

⁶ House Rep. No. 2243, on S. 2496, 74th Cong., 2d Sess., p. 3.

and Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 (1937), enforcement of the Act was held to be the province of the Courts, while negotiation, mediation, and arbitration were held to be the roles of the Mediation Board and the Adjustment Board. This system of administration and enforcement was reiterated in later decisions and, after enactment of the Civil Aeronautics Act and the Federal Aviation Act, was held applicable to disputes between air carriers and their employees. Pan American World Airways v. Flight Engineers Int'l., 306 F.2d 840 (C.A. 2d, 1962); Flight Engineers Int'l. v. Eastern Air Lines, 208 F. Supp. 182 (D.C. S.D. N.Y., 1962), aff'd 307 F.2d 510 (C.A. 2d, 1962).

The instances of administrative actions by the Board, cited in its brief (p. 25) and in ALPA's brief (p. 34), do not serve as authoritative precedents for the enforcement jurisdiction here claimed because they were either complaint proceedings which did not result in compliance orders or they were administrative review proceedings not comparable to compliance proceedings.

Thus, the Board's assertion of jurisdiction to determine the merits of ALPA's complaint against Southern is without precedent in its 24-year history and without benefit of judicial precedent.

Further, even if jurisdiction to hear and determine the complaint were conceded, the orders which the Board actually issued could not be justified under any accepted view of its powers. Nothing is clearer from the decisions of the courts under the Railway Labor Act, as extended to air carriers, than the principle that Congress has conferred no power upon any agency of Government — court or board — to resolve the terms of a bargaining dispute. At most there is a power — in the courts — to enforce the procedures for negotiation, mediation and arbitration. The statutory plan for dealing with such disputes has been succinctly stated by the Supreme Court as follows:

" 'Major disputes' go first to mediation under the auspices of the National Mediation Board; if that fails,

then to acceptance or rejection of arbitration, cf. § 7; Trainmen v. Toledo, P & W. R. Co., 321 U. S. 50, 64 S.Ct. 413, 88 L.Ed. 534, 150 A.L.R. 810; and finally to possible presidential intervention to secure adjustment. § 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5, First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 725, 65 S.Ct. 1282, 1290 (1945).

Brotherhood of Locomotive Engineers v. B. & O. R. Co., ___ U.S. ___, decided March 4, 1963 (31 Law Week (B.N.A.) 4240), is to the same effect. This statutory plan, with its inherent limitations on the powers of Government agencies and courts, also has been declared applicable to disputes between air carriers and their employees since enactment of the Federal Aviation Act. Pan American World Airways v. Flight Engineers Int'l.; Flight Engineers Int'l. v. Eastern Air Lines, supra, p. 8.

Petitioners submit, therefore, that the Board had no jurisdiction to entertain and decide ALPA's complaint or to issue the orders hereunder review.

IV. The Board's Orders Improperly Dictated Terms of the Southern-ALPA Agreement and Were Improvidently Issued.

The Board's brief acknowledges that its orders were a mandate as to some terms of the directed collective agreement. As there explained, a mere direction "to commence bargaining in good faith" . . .

"would not have been sufficient." The brief goes on to say that these are "guidelines" which "merely define the minimum standards for future good faith bargaining rather than the dictation of the terms of an agreement" (Board's brief, p. 29).

But these "guidelines" were coupled with the admonition that for failure to comply with the order "Southern's authority to engage in air transportation would be subject to ^{Suspension} suppression or revocation." (Tr. 2591)

The Board argues that this is not dictation, but petitioners submit that it is. Even if the Board's jurisdiction is conceded, there is no precedent, as we have pointed out in III above (pp. 7 - 8) for orders which prescribe detailed terms for collective agreements. The absence of such power in any agency of Government has been repeatedly affirmed by the authorities there cited.

The Board's orders, thus, are not only unsupported by precedent, they are an improvident exercise of the Board's powers like the order of the Interstate Commerce Commission which was struck down by the Supreme Court in the Burlington case (petitioners' original brief, p. 11).

V. Petitioners, or Some of Them, Were Indispensable Parties to the Proceedings Before the Board and the Failure to Make Them Parties Invalidates the Proceedings.

If the Board had jurisdiction, it should have made petitioners parties to the proceeding because (1) the terms and conditions of their employment would necessarily be affected by the action which ALPA sought from the Board and Southern; and (2) the petitioners were an essential source of information needed for complete marshalling of the facts relative to the circumstances of their employment and for the formulation of an appropriate Board order.

The record of the proceeding, as now completed, demonstrates the effect of this initial error. The evidence on the issue of "permanency"

of petitioners' employment is incomplete for the very reason that petitioners were not heard. It was on this fact issue that the Board members were divided 3-2 (Tr. 2580, 2599).

Decisions cited by the Board (its brief, p. 31) are inapposite. Unlike the appeal of petitioners herein, the National Licorice case (309 U. S. 350) involved an employer-dominated bargaining committee and employer-coerced contracts with individual employees, and it was the employer who sought to interpose those contracts against the complaining union. The Court expressly reserved decision as to a controversy like the present, saying (pp. 366-7):

"It is unnecessary to consider now to what extent or by what procedure it would be necessary to make the employees parties to a proceeding pending before the Board in the event that it undertook to make an order directed to the employees foreclosing any asserted rights under their contracts in order to effectuate the policies of the Act."

Justice Douglas, concurring specially with Justice Black, was even more explicit (pp. 369-370):

"Mr. Justice BLACK and I see no reason or occasion for the modification of the order. For as stated in the opinion of the Court, the Board has not undertaken to pass on the rights of the employees under those contracts. Nor has any employee urged, here or below, that the order affects his contractual rights or casts a cloud on them. Whether the employees would be indispensable parties to the proceeding should the Board in order to effectuate the policies of the Act undertake to nullify their rights is a question on which we want to reserve decision until the Board passes on it and until it is put in issue by persons who have a standing to raise it."

In the Semi-Steel case (160 F.2d 388) and the Oughton case (118 F.2d 486) the Labor Board was upheld in its denial of requests for intervention by employee groups who sought to be heard on complaints of unfair labor practices against the employers. The opinions in both

cases distinguish the situations there involved from one in which affected employees could provide information for determination of essential facts or for formulation of an appropriate order.

Petitioners submit that the circumstances of the present case are distinguishable because they are acting independently of the employer, Southern, and it is they, not Southern, who seek to be recognized as indispensable parties. Because they are indispensable, the onus is on the Board to see to it that they are made parties.

The Consolidated Edison case, 305 U. S. 197, cited in petitioners' original brief (p. 14), was followed in N.L.R.B. v. Cowell Portland Cement Co., 108 F.2d 198 (C.A. 9th, 1939), where, on the complaint of a C.I.O. union, the employer was directed by the Board to cease giving effect to an A.F.L. union's contract. The A.F.L. union had not been given notice or made party to the Board's proceeding, and because of this the court remanded the case to the Board. The court said (p. 205):

"While we cannot say that in the Consolidated Edison case the Supreme Court expresses the doctrine that administrative tribunals must conform to 'the cherished judicial tradition embodying the basic concepts of fair play' of Morgan v. United States, 304 U. S. 1, 22, 58 S.Ct. 773, 778, 999, 82 L.Ed. 1129, with regard to all the contractual property rights of employees, we hold that such protection must be afforded at least to such rights as are claimed to have been created by the closed-shop contract with the employer here involved. As to such rights, at least, laboring men are now entitled to have them considered under the 'basic concepts of fair play' and to have their 'day in court' in which they are given the 'essentials of a full and fair hearing, with the right . . . to have a reasonable opportunity to know the claims advanced against them' Morgan v. United States, supra, 304 U. S. 21, 58 S.Ct. 777, 82 L.Ed. 1129."

Both the Board and ALPA argue that petitioners had actual and legal (constructive) notice of the proceeding and therefore that they

should have requested intervention earlier to protect their interests (Board's brief, pp. 7, 17; ALPA's brief, pp. 10, 38-40). But, as petitioners have shown, they did not receive actual notice until the Board's proceeding was nearly concluded (p. 5 above; and pp. 2-3 of their original brief). Validity of the two Federal Register notices as providing legal notice to petitioners is open to serious question, because neither of the notices contained any statement indicating petitioners' rights were in jeopardy (see petitioners' original brief, pp. 2-3).

In any event, regardless of this question of notice or lack of it, the Board has failed in its duty to deal with petitioners as indispensable parties, and this failure invalidates the proceeding. Moreover, the omission of petitioners as parties to the proceeding is a complete answer to ALPA's contention that petitioners are barred by Section 1006(e) of the Federal Aviation Act from raising this issue at this time.

VI. ALPA's Failure to Represent or to Assure the Representation of Petitioners Invalidates the Board's Proceeding.

While affirming its certification as representative of the pilot employees of Southern (ALPA's brief, p. 2), ALPA acknowledges no right on the part of the petitioners to be represented before the Board (ALPA's brief, pp. 48-49). The only explanation given for this is the fact that the strikers and the replacement pilots have conflicting interests (ALPA's brief, pp. 48-49).

The Board, citing decisions upholding discriminations by bargaining representatives when based on "relevant differences among the employees," argues that petitioners are contending for a "self-defeating course" on the part of ALPA (Board's brief, p. 33).

Neither of these contentions is correct. Conceding that ALPA was in a conflicting position, it was still the statutory representative for all the pilot employees. It should at least have given an appropriate notice to petitioners.

Petitioners do not contend that ALPA should follow a "self-defeating" course; they simply assert their right to be represented. ALPA elected to engage in an "economic" strike; hence it must accept the consequence that Southern would hire replacement employees. The fact that subsequent events led to a Board determination that an unfair labor practice had occurred does not alter the right of these replacement employees to be represented.

Steele v. Louisville & N. R. Co., 323 U. S 192, and other cases cited in the Board's brief (p. 33) accept "relevant differences" but reject "hostile discrimination" as the basis for actions by the statutory representative. Petitioners submit that ALPA's demonstrated "hostile discrimination" against them is unacceptable under these decisions.

VII. The Board's Findings that Southern Failed to Bargain in Good Faith Are Not Supported by the Record.

(1) The finding as to unreviewable discipline. Petitioners agree with conclusions of the Board minority (Tr. 2601-2), the examiner (Tr. 2246-51) and the District Court in Tennessee (Op., p. 34, see Tr. 2565, 2593) on the tenor and effect of Southern's bargaining demand on this point. Conceding this demand may not have been justified (and the examiner found some justification for it (Tr. 2246-51)), it was not an irrevocable demand. As the minority, the examiner and the court found, the parties engaged in "hard bargaining," and ALPA shares the responsibility with Southern for breaking off negotiations following this demand.

But regardless of fault on this issue, the Board was not justified in placing its decision and order of July 25, 1962 on this ground when Southern had already abandoned this demand in compliance with the Tennessee court's judgment of April 27, 1962.

(2) The finding as to seniority. Petitioners rest their argument that Southern rightfully demanded job protection for the replacement

pilots on the Supreme Court's decision in the Mackay Radio case, 304 U.S. 333, and the other decisions cited in petitioners' original brief (pp. 19-20). As this was an economic strike in its inception, Southern had the right, under these decisions, to employ replacement pilots on a permanent basis if necessary in order to carry on its business, and to reinstate strikers as needed, crediting seniority to replacements from their dates of hire and to strikers from their dates of reinstatement. Having the right to so conduct its business, it must follow that Southern had the right to propose this in its bargaining negotiations. And, if Southern had the right to make this proposal, it cannot be charged with bad faith bargaining in doing so. Indeed it had a duty as well as a right to inform both the replacements and the strikers of its intentions in this regard.

The Board and ALPA discuss Southern's employment practices and this bargaining proposal in terms of "superseniority" (Board's brief, p. 36; ALPA's brief, p. 42), but petitioners see them justified under the foregoing decisions not as a form of superseniority, but as normal incidents of hiring and reinstating employees under the circumstances of an economic strike.

The Board majority indicated it was not satisfied with the showing in the record as to the need for Southern to give replacement pilots employment on an indefinite ("permanent") hire basis. But this incompleteness is the result of the Board's failure to bring petitioners in as parties, for which petitioners, too, complain (pp. 10-13 above).

Somehow the Board majority (Tr. 2577), but not the minority (Tr. 2599), the examiner (Tr. 2254-56), or the District Court in Tennessee (see petitioners' original brief, p. 12), found that Southern had a motive to punish strikers rather than a purpose to carry on business operations in proposing a new seniority basis for the pilot employees. Applying a subjective test to the parties' negotiations, the Board majority drew inferences of hardship and coercive effect which did not

exist. Petitioners submit this subjective test was not properly applied and the conclusion based upon it is not justified.

The cases relied on by the Board (brief, p. 37) and ALPA (brief, p. 43) as supporting the Board's determination that Southern had engaged in an unfair labor practice are readily distinguishable on the facts.⁷

Finally, this bargaining demand, like the one on discipline, was a counteroffer, not an inflexible demand. Petitioners believe the Board minority, the examiner and the Tennessee District Court, were correct in their view on this, and that the Board was in error in concluding that bargaining broke down because of Southern's insistence on this.

Petitioners submit, therefore, that the Board's orders are void for lack of jurisdiction or that they are invalid because of substantial errors requiring remand for further proceedings in accordance with the instructions of this Court.

Respectfully submitted,

PHILIP F. HERRICK

NICHOLAS E. ALLEN

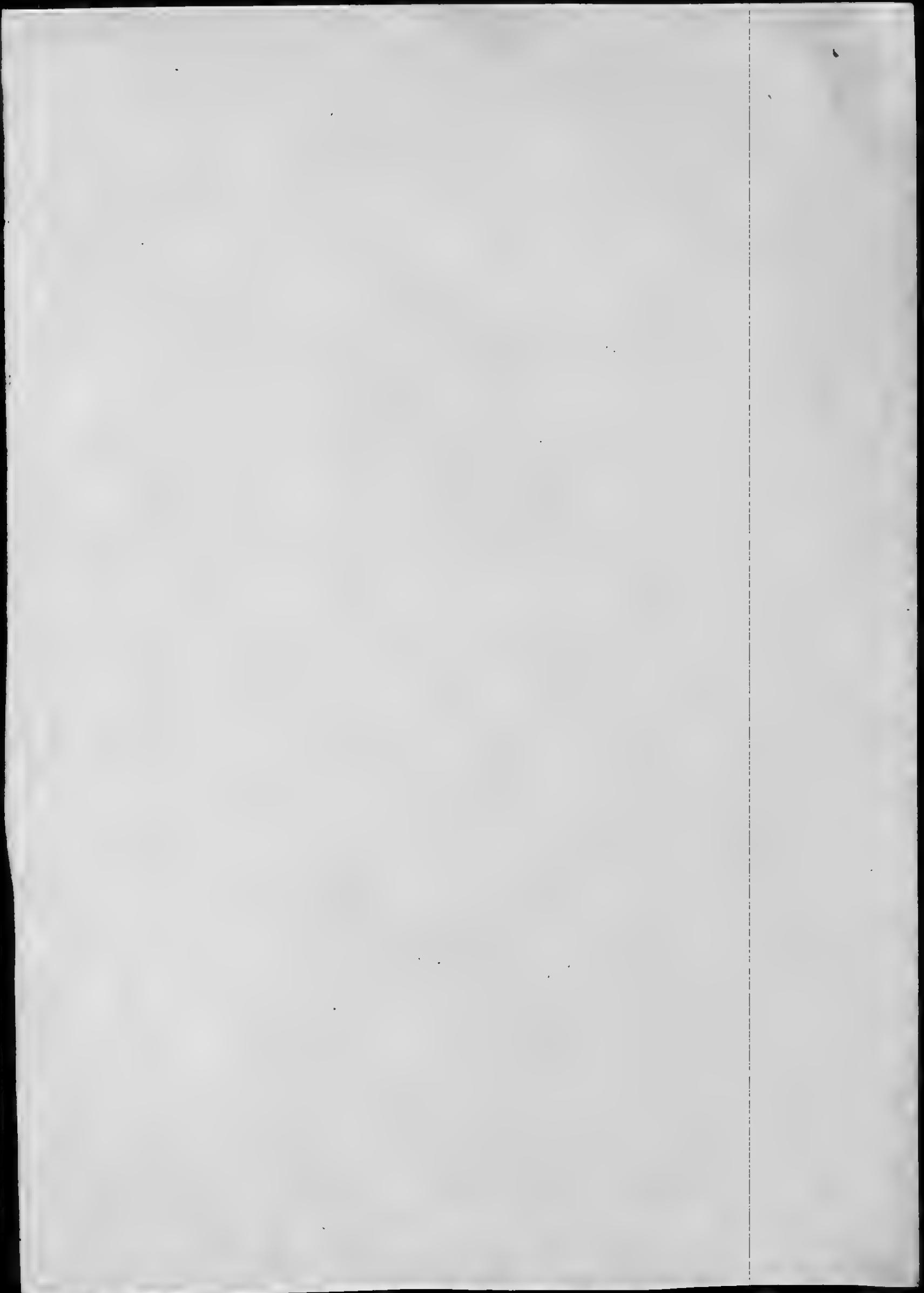
1001 15th Street, N. W.
Washington, D. C.

Of Counsel:

Attorneys for Petitioners

JOHN B. KNEIPPLE

⁷ Olin Mathieson Chemical Corporation v. N.L.R.B., 232 F.2d 158 (C.A. 4th, 1956), and N.L.R.B. v. California Date Growers Association, 259 F.2d 587 (C.A. 9th, 1958) involved situations where the employer adopted a superseniority policy after the strike had been terminated. Ballas Egg Products, Inc. v. N.L.R.B., 283 F.2d 871 (C.A. 6th, 1960) did not involve replacements. It was held there that an employer's offer of superseniority to any employee who returned to work was an unlawful interference with the right to strike. A similar offer in Swarco, Inc. v. N.L.R.B., 303 F.2d 668 (C.A. 3rd, 1962) was also held to be outside the scope of employers' conduct permitted by Mackay Radio, supra, and Potlatch Forests, 189 F.2d 82 (C.A. 9th, 1951).



JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, ET AL.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

AIR LINE PILOTS ASSOCIATION,

Intervenor.

**ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD**

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 15 1963

Nathan J. Paulson
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, ET AL.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AIR LINE PILOTS ASSOCIATION,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
CIVIL AERONAUTICS BOARD

JOINT APPENDIX

(i)

INDEX

	<u>Record Page</u>	<u>J.A. Page</u>
Amended Prehearing Conference Stipulation, dated January 28, 1963	1	
Prehearing Order, dated January 31, 1963	4	
Stipulation, Additional Issues, dated February 20, 1963	5	
Order Approving Stipulation, dated February 27, 1963	6	
Complaint, dated July 20, 1960	2	6
Answer on Behalf of Southern Airways, Inc. [Excerpts]. Received August 8, 1960	11	13
Reply by Air Line Pilots Association, International with Respect to Southern Airways, Inc. Answer [Excerpts] Received September 6, 1960	60	14
Petition for Enforcement, Docketed September 26, 1960	75	15
Notice of Hearing, dated October 25, 1960	77	16
Notice of Postponement of Hearing, dated November 2, 1960	81	17
Excerpts from Transcript of Proceedings, December 1, 1960	86	18
<u>Witnesses:</u>		
James Philip Pashkov		
Direct	4	89
Cross	225	312
Kay McMurray		
Direct	289	378
Cross	308	397
Clarence Sayen		
Direct	481	572
William S. Magill, Jr.		
Direct	632	726
Cross	761	860
Graydon Hall		
Direct	800	899
Cross	839	938
Edward L. Martin		
Direct	852	951
CAB's Notice to All Parties Postponing Hearing Until January 17, 1961, dated January 3, 1961	1118	53
Frank W. Hulse		
Direct	1062	1164
Cross	1115	1220
Erle Phillips		
Direct	1146	1253
Cross	1206	1313

	Record Page	J.A. Page
ALPA Exhibit No. 3 -- Letter dated July 30, 1959	1434	63
ALPA Exhibit No. 34 -- Letter dated June 1, 1960	1807	64
ALPA Exhibit No. 34A -- Letter dated May 24, 1960	1808	65
ALPA Exhibit No. 35 -- Telegram dated May 25, 1960	1809	66
ALPA Exhibit No. 43 -- Company Offer dated July 12, 1960	1817	67
ALPA Exhibit No. 45 -- Telegram dated July 25, 1960	1820	68
ALPA Exhibit No. 47 -- Mediator's July 28, 1960 - Proposal for Settlement of Dispute	1823	68
ALPA Exhibit No. 48 -- Letter dated July 28, 1960	1824	69
ALPA Exhibit No. 49 -- Letter dated July 28, 1960	1825	70
ALPA Exhibit No. 57 -- Arbitration Opinion	1834	71
ALPA Exhibit No. 60 -- Certification dated June 18, 1961	1855	72
ALPA Exhibit No. 61 -- Answer and Cross-Bill [Excerpts]	1858	73
Southern Exhibit No. 2 -- Findings of Fact & Conclusions of Law -- [Excerpts]	1950	74
Brief of Southern Airways, Inc., Received March 17, 1961 [Excerpts]	1989	75
Brief of Air Line Pilots Association International to Hearing Examiner William F. Cusick [Excerpts]. Received March 17, 1961	2071	77
Brief to Examiner from Robert C. Downes, Enforcement Attorney. Received March 17, 1961	2124	79
Initial Decision of Examiner William F. Cusick [Excerpts]. Served September 22, 1961	2168	81
Exceptions of Air Line Pilots Association, International, to Initial Decision of Examiner William F. Cusick, Received October 9, 1961 [Excerpts]	2261	89
Letter from CAB's Enforcement Attorney to Civil Aeronautics Board, dated October 27, 1961	2314	91
Brief of Air Line Pilots Association, International to Civil Aeronautics Board in Support of Exceptions to Initial Decision [Excerpts] -- Received November 15, 1961	2316	92
Brief of Southern Airways, Inc., in Support of Initial Decision of Examiner William F. Cusick [Excerpts], Received November 15, 1961	2374	96
Transcript of Proceedings on Oral Argument [Excerpts]. November 30, 1961	2454	97
CAB's Press Release, May 25, 1962	2556	97

	Record Page	J.A. Page
CAB's Opinion - E-18560 - Served July 6, 1962	2558	101
Order No. E-18560	2612	155
Appendix -- Excerpts from the Initial Decision of Examiner William F. Cusick in ALPA v. Southern, Enforcement Proceeding, Dkt 11654	2613	156
Petition for Directive by Southern Airways, Inc.. dated August 14, 1962	2661	201
Exhibit A -- Letter from Fisher & Phillips to Mr. Clarence Sayen, Air Line Pilots Ass'n., dated July 31, 1962	2666	204
Reply to Petition for Directive and Petition for Order Directing Compliance by Air Line Pilots Ass'n., International [Excerpts], Received August 20, 1962	2669	205
Order No. E-18737, Adopted by the CAB at its office in Washington, D. C., on the 27th day of August, 1962	2678	206
Petition for Intervention, Rehearing and Reconsideration. Filed by Petitioners, October 29, 1962 [Excerpts]	2685	211
Answer of Air Line Pilots Association International to Petition of Southern Airways Pilots Association, et al. for Intervention, Rehearing and Reconsideration [Excerpts]. Dated November 13, 1962	2703	212
Motion for Leave to File Reply and Petitioners' Reply to Answer of Air Line Pilots Association, [Excerpts]. Received November 23, 1962	2720	214
Exhibit A -- Excerpts from Order, dated Nov. 9, 1962	2747	217
Exhibit B -- Back to Work Agreement -- Memorandum of Agreement - Southern Airways, Inc. with Air Line Pilots Association, International -- [Excerpts]	2756	219
CAB's Order No. E-19162 -- Order Dismissing Petition for Intervention, Rehearing, and Reconsideration, Adopted January 3, 1963	2779	223



JOINT APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHERN PILOTS ASSOCIATION,
LEWIS H. HOLMAN, et al.,

Petitioners,

v.

Docket No. 17,362

CIVIL AERONAUTICS BOARD,

Respondent,

AIR LINE PILOTS ASSOCIATION,

Intervenor.

AMENDED
PREHEARING CONFERENCE STIPULATION

Subject to the Court's approval and the Court's action on any motion to enlarge the issues, the parties hereby stipulate and agree as follows with respect to the issues and the procedures and dates for the filing of the briefs and the joint appendix herein.

I

Issues

The petition for review challenges (1) an order of the Board (E-18560) directing Southern Airways to resume bargaining with ALPA

(the legal bargaining representative of the Southern pilots) for the purpose of negotiating a new labor contract and specifying certain principles which the Board found should be observed by Southern in order to constitute good faith bargaining, and (2) a later order (E-18737) issued pursuant to a request by Southern for clarification. ALPA and Southern subsequently entered into a new agreement.

Petitioners' issues are:

1. Did the Board have jurisdiction to hear the complaint filed by ALPA and to determine that Southern violated the Railway Labor Act?
2. Were the Board proceedings invalid because petitioners, or some of them, were indispensable parties to the proceeding but were not made parties?
3. (a) Whether the Board's opinion and orders were only guidelines to the parties in their further negotiations, or whether they constituted a directive to Southern to discharge some and place the other replacement pilots at the bottom of the seniority list?
(b) Whether, if the answer to (a) is that the opinion and orders constituted a directive, the Board had authority to make such directive?
(c) Whether, regardless of the answer to (a), the Board erred in its conclusions in relation to job retention and seniority rights as set forth at pages 31 and 32 of its Opinion and Order E-18560 and in Order E-18737?
(d) Whether the record supports the Board's findings that the replacement pilots were hired without assurances of job and seniority rights as against the striking pilots?
4. Whether the Board's subsidiary findings as expressed in its opinion justify its conclusions that, beginning on July 12, 1960, Southern did not bargain in good faith and made illegal demands on ALPA?

Respondent's and intervenor's issues are:

1. Whether the collective bargaining agreement entered into between Southern and ALPA has rendered moot the Board orders here challenged;

2. Whether the petition for review was timely filed; and
3. Whether (a) petitioners timely pursued or exhausted their remedies before the Board, and (b) the provisions of Section 1006 (e) of the Federal Aviation Act preclude the consideration by the Court of petitioners' contentions or any of them?

II

Procedures With Respect To Printing of Joint Appendix
and Briefs, and Use of Unprinted Portions of Record

The joint appendix shall contain the materials required to be printed by the Rules of the Court, the materials designated by the parties as hereinafter provided, and this stipulation and the order of the Court approving the stipulation. Board Counsel may release the transcript of record to any printer in the District of Columbia selected by petitioners to print the joint appendix.

All briefs will be served and filed on or before the dates fixed hereinafter with reference to the pages of the certified record ("Tr."). At the time each party serves its brief, it will also serve its designation of the portions of the certified record to be printed in the joint appendix. As soon as all designations have been made, the petitioners shall cause the joint appendix to be printed with the page numbers of the record as certified to this Court appearing at the place where each new record page begins on the printed page of the joint appendix, and running heads showing the record pages appearing thereon shall be printed at the outer top corner of each page of the printed joint appendix. The usual numerical designation of the printed joint appendix will appear in the center of the top of the page.

It is further agreed that any party, in brief or at the hearing in the case, may refer to and rely upon any portion of the original transcript herein which has not been printed to the extent that such portion may be material to the stipulated issues, it being understood that any portions of the record thus referred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

III

Filing Dates

The time for the filing of briefs and joint appendix shall be as follows:

1. Petitioners' brief shall be filed on or before January 11, 1963.
2. Respondent's and intervenor's briefs shall be filed on or before February 25, 1963.
3. Petitioners' reply brief, if any, shall be filed on or before March 12, 1963.
4. The joint appendix to briefs shall be filed on or before March 12, 1963.

/s/ Philip F. Herrick
Attorney for Petitioners

/s/ O. D. Ozment,
Attorney for Respondent

/s/ James L. Highsaw, Jr.
Attorney for Intervenor

Dated: January 28, 1963.

[Certificate of Service]

No. 17,362

September Term, 1962

Before: Burger, Circuit Judge, in Chambers.

PREHEARING ORDER

On consideration of intervenor's consent motion to approve amended prehearing conference stipulation, and it appearing that the parties have lodged with the Clerk an amended prehearing conference stipulation in this case, and the amended prehearing stipulation having been considered, it is hereby approved, and it is

ORDERED that the amended prehearing stipulation shall control further proceedings in this case unless modified by further order of this

court, and that the amended prehearing stipulation and this order shall be printed in the joint appendix of the parties herein.

Dated: Jan. 31, 1963.

STIPULATION
ADDITIONAL ISSUES

It is hereby stipulated by and between counsel of record:

1. That, by order of the Court dated December 21, 1962, petitioners' issue No. 2 was changed to No. 2 (a) and issue No. 2 (b) was added as follows:

"2.(b) Were the Board proceedings invalid because ALPA failed to represent the petitioners."

2. That by order of the Court dated February 7, 1963, petitioners' amended petition for review was filed wherein petitioners sought review of an additional order of the Board thereby presenting an additional issue, as follows:

Whether "the Board erred in dismissing, by its Order No. E 19162, dated January 3, 1963, the petition for intervention, rehearing and re-consideration filed with the Board by the petitioners herein,"

3. That the foregoing are issues before the Court under the amended petition for review.

/s/ Nicholas E. Allen
Attorney for Petitioners

/s/ O. D. Ozment
Attorney for Respondent

/s/ James L. Highsaw, Jr.
Attorney for Intervenor.

February 20, 1963.

September Term, 1962

Before: Washington, Acting Chief Judge, in Chambers.

ORDER

Counsel for the parties in the above-entitled case having submitted a stipulation of additional issues under the amended petition for review filed herein, and the stipulation having been considered, the stipulation is hereby approved, it is

ORDERED that the Clerk is hereby directed to file the stipulation in this case.

Dated: Feb. 27, 1963.

COMPLAINT

The Air Line Pilots Association, International, Petitioner herein, complaining of Southern Airways, Inc., shows as follows:

1. The Air Line Pilots Association, International, hereinafter referred to as Petitioner, is, and at all times hereinafter mentioned, was a voluntary unincorporated Association consisting of more than seven (7) members, being a labor organization duly designated and authorized to act as the collective bargaining representative of the air line pilot employees in the service of Southern Airways, Inc. pursuant to the provisions of the Railway Labor Act, as amended.

2. This Complaint is brought and proceedings instituted by Petitioner pursuant to the provisions of the Federal Aviation Act of 1958, hereinafter referred to as the Act, Title II, Sections 204(a), Title IV, Section 401(g) and Title X, Section 1002(a), (b) and (c).

3. Southern Airways, Inc. is a common carrier by air acting as such pursuant to certificate of authority issued by this Board in accordance with the provisions of the Act.

4. Petitioner seeks an order of the Civil Aeronautics Board directing Southern Airways, Inc. to comply with the provisions of the Act and in the event of that carrier's failure to do so, this Board is requested to suspend or revoke all certificates authorizing

[3]

Southern Airways, Inc. to engage in air transportation which have heretofore been issued to said carrier by this Board.

5. The immediate circumstance which gives rise to this Complaint stems from a dispute between the carrier and the Air Line Pilots Association, International, concerning the terms and conditions of an amended collective bargaining agreement. This dispute had its beginning in July 1959 when negotiations were begun between the parties. It was apparent from the inception of these negotiations, and the Petitioner alleges the fact to be, that Southern Airways, Inc. intentionally and by design, totally disregarded its statutory obligation to negotiate in good faith, with the thought always in mind that by this course of action a situation could be induced whereby the Company would rid itself of any obligation to comply with the Railway Labor Act as required by its certificate and would operate with strike-breaking pilots and other strike-breaking employees.

6. Consistent with this premeditated design, Southern Airways, Inc. refused any and all practical approaches to a settlement of the dispute, first in negotiations and then in mediation. When the National Mediation Board proffered arbitration or other means of settlement to the parties, Southern Airways, Inc. promptly refused any such means of settling said differences, although the Association has accepted the arbitration and other proffered means of submitting the issues to neutral parties.

[4]

7. The inevitable result for which Southern has worked over a period of many months has finally come to pass, and since June 5, 1960,

the Company has provided no service or only meager service under its certificate and this is being done with hurriedly recruited strike-breaking pilots of highly questionable proficiency and other such employees, all contrary to its statutory obligations as hereinafter indicated.

8. Petitioner makes this Complaint and institutes this proceeding upon a number of grounds, that is to say:

(A) The declared policy of the Board is set forth in Title I, Sections 102(a), (b) and (c) of the Act. In this declaration, it is stated to be in the public interest and in accordance with the public convenience and necessity:

(a) To encourage and develop an air transportation system properly adopted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service and the national defense;

(b) To regulate air transportation in such a manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and to foster economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) To promote adequate economical and efficient service by air carriers at reasonable charges. . .

Southern Airways, Inc. has flagrantly flaunted these declared policies and failed to live within these statutory requirements, i. e.,

1. Southern management, by its present actions, is not meeting the requirement of its certificates, is not meeting the need of the domestic commerce, nor the postal service.

2. Southern management, by its present actions is embarked upon a devastating economic program; and is utilizing funds provided by the Federal Government to foster personal objectives inconsistant with Board policy and in violation of the Act.

(B) Title IV, Sections 401 (e) and (1) provide among other things:

(e) "Such certificate issued under this Section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered. . ."

(1) "Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Post Master General. . ."

Southern Airways management has, by its present wrongful action flaunted these statutory requirements and is in disregard of the terms, limitations and conditions pursuant to which this Board issued certificates authorizing Southern to engage in transportation by air; and Southern's operation in such manner is contrary to the letter and spirit of the Act.

[6]

9. Southern's relations with the various crafts and classes of employees has been marked by continuing deterioration. This is attributed to Southern's refusal to comply with its obligations under both the Act and the Railway Labor Act, i.e., Title I, Section 2 First of the Railway Labor Act, which provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

10. Southern's disregard of its statutory obligations has seriously impaired the ability of its management to discharge the Company's

functions as a common carrier under the Act. Title IV, Sections 404 and 406 of the Act deal with the matters of "Rates for the carriage of persons and property", "carrier's duty to provide service . . .", and "Ratemaking Element", that is to say:

Section 404(a) provides and requires: "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation as authorized by its certificate . . ."

Section 406(b) provides and requires that in fixing and determining fair and reasonable rates of compensation for the transportation of mail, the Board shall consider among other factors: "the need of each such air carrier . . . under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States . . ."

The present interruption of the Company operation as required by its certificate, brought about by the premeditated and reckless

acts of its management raises serious doubt whether the Company, under its present policies and management, can in the future properly discharge its functions as a common carrier. Certainly the company is not presently fulfilling the mandates of the Act, due solely to arbitrary and ruinous attitude of management. Petitioner urges the Board to intervene not alone in the immediate situation but on a continuing basis.

11. Petitioner, representing pilots employed by this and other carriers, has a substantial interest and concern for the public interest in the economic, proper and safe operation of common carriers by air.

The management of Southern, by its present actions, is dissipating the assets of this Company and utilizing funds provided in great part by the Federal Government to foster personal objectives not consistent with the

obligations of the Company under the Federal Aviation Act and the Railway Labor Act. Rather than make and maintain reasonable agreements with its employees, the facts will show that Southern's management is embarked upon a deliberate program to rid itself of all organized groups in its employ. This is true despite the clear and contrary requirements of the Railway Labor Act, Title I, Section 2, First hereinabove quoted.

Your Petitioner, by this Complaint, respectfully calls the attention of the Board to the urgent and serious problems which Southern's actions have brought into focus. There must be prompt and substantial improvement in the management of this carrier's operation

[8]

as a condition of continued enjoyment of the Board's certification. Without such prompt changes and improvements the declared purposes of the Act are, and will continue to be frustrated.

12. Petitioner respectfully urges the situation requires summary intervention on the part of the Board. Such intervention to effect restoration of service as required by Southern's certificates and normal operations should constitute only one part of the Board's intervention. Until there is substantial evidence of change and compliance with statutory obligations by Southern, the Board should maintain intervention on a continuing basis.

WHEREFORE, your Petitioner prays the order of the Board:

1. Directing and requiring Southern Airways, Inc. to cease and desist from the course of conduct complained of and described herein;
2. Direction Southern Airways, Inc. to comply with Section 401(e) and 401(k) (4) of the Federal Aviation Act of 1958, and Title II and Title I, Sections 2 First of the Railway Labor Act, within a reasonable time to be fixed by the Board;

3. Provide for intervention by the Board on a continuing basis for the purpose of assuring compliance by Southern Airways, Inc. with the foregoing requirements of the law;
4. Directing Southern Airways, Inc. forthwith to restore and resume full service and operation of the air

[9]

- carrier as required by the Board's certification of said carrier;
5. Providing that in the event said carrier shall refuse to comply with the Board's said order, or any part thereof, all certificates of authority to engage in air transportation which have been heretofore issued by the Board to Southern Airways, Inc., be suspended or revoked.

Respectfully submitted,

AIR LINE PILOTS ASSOCIATION, INT'L.

/s/ Clarence N. Sayen, President

* * * *

[Rec'd. Aug. 8 - 4:41 PM '60]
[Civil Aeronautics Board]

[11]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

In the Matter of Compliance with)
Section 401 (f) and Section 401 (k))
of the Federal Aviation Act of) Docket No. 11654
1958 by)
SOUTHERN AIRWAYS, INC.)

ANSWER ON BEHALF OF SOUTHERN AIRWAYS, INC.

Communications with respect to
this document should be sent to:

CECIL A. BEASLEY, JR.
912 American Security Building
Washington 5, D. C.

and

ERLE PHILLIPS
1410 Rhodes Haverty Building
Atlanta 3, Georgia

Attorneys for
SOUTHERN AIRWAYS, INC.

August 8, 1960

* * * * *

[15]

6. On or about July 30, 1959, ALPA notified Southern of its desire to amend the Employment Agreement of July 25, 1958, submitting written proposals for changes. In accordance with procedures established by the Railway Labor Act, negotiations between the Carrier and ALPA were conducted September 22, 23, and 24, 1959. * * *

* * * * *

[22]

14

[22]

* * * *

The Complaint by ALPA is based upon the proposition that Southern has violated the Federal Aviation Act by reason of an alleged violation of the Railway Labor Act. As shown hereinabove, that allegation is unfounded. Furthermore, the jurisdiction to make the primary determination as to violations of the Railway Labor Act is vested exclusively in the agency specifically created by the Act to make such a determination.

* * * *

[Rec'd. Sept. 6 8:47 AM '60]
[Civil Aeronautics Board]

[60]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

In the Matter of Compliance With)
Section 401 (f) and Section 401 (k))
of the Federal Aviation Act of) Docket No. 11654
1958 by)
SOUTHERN AIRWAYS, INC.)

REPLY
by

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
With Respect to
SOUTHERN AIRWAYS, INC. ANSWER

Names and addresses of persons to whom communications are to be sent:

F. Harold Bennett, Attorney
Air Line Pilots Association, Int'l.
55th Street and Cicero Avenue
Chicago 38, Illinois

M. B. Wigderson, Attorney
Air Line Pilots Association, Int'l.
55th Street and Cicero Avenue
Chicago 38, Illinois

[Rec'd. - Sept. 26 - 3:44 PM '60]
[Civil Aeronautics Board]

[75]

PETITION FOR ENFORCEMENT

In the opinion of the undersigned, Director of the Bureau of Enforcement, there are reasonable grounds to believe that certain provisions of the Federal Aviation Act of 1958, as amended, and requirements thereunder have been violated by Southern Airways, Inc., as alleged in the complaint filed by the Air Line Pilots Association on July 22, 1960, which complaint is hereby incorporated herein by reference; and that formal investigation of such alleged violations by the Board is in the public interest. No offer to satisfy the complaint as permitted by Rule 204(c) of the Rules of Practice in Economic Proceedings has been served.

Therefore, this petition for enforcement is docketed under the provisions of Rule 206 of the said Rules of Practice and an enforcement proceeding thereby is instituted so that the Board may determine whether any violations have been committed as alleged in said complaint and whether the relief requested therein should be granted.

An answer to the complaint incorporated herein has been filed in accordance with Rule 204(b) of the Rules of Practice, and a reply to the answer has been filed in accordance with Rule 209 of the Rules of Practice.

/s/ James Anton
Director
Bureau of Enforcement

Docketed: September 26, 1960

[77]

[77]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

AIR LINE PILOTS ASSOCIATION

v.

SOUTHERN AIRWAYS, INC.

DOCKET 11654

NOTICE OF HEARING

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that hearing in the above-entitled matter is assigned to be heard on November 15, 1960, at 10:00 a.m. (eastern standard time) in Room 911, Universal Building, Connecticut and Florida Avenues, N. W., Washington, D. C., before Examiner William Cusick.

Dated at Washington, D. C., October 25, 1960.

/s/ Francis W. Brown
Chief Examiner

[81]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

AIR LINE PILOTS ASSOCIATION

v.

SOUTHERN AIRWAYS, INC.

DOCKET 11654

NOTICE OF POSTPONEMENT OF HEARING

Notice is hereby given, pursuant to the provisions of the Federal Aviation Act of 1958, as amended, that hearing in the above-entitled matter now assigned to be held on November 15, 1960, is postponed to December 1, 1960, at 10 a.m. (eastern standard time) in Room 911, Universal Building, Connecticut and Florida Avenues, N. W., Washington, D. C., before Examiner William F. Cusick.

Dated at Washington, D. C., November 2, 1960.

/s/ Francis W. Brown
Chief Examiner

(SEAL)

[86]
[Tr. 1]

Room 911, Universal Bldg.
Washington, D. C.
Thursday, December 1, 1960

The above-entitled matter came on for hearing, pursuant to notice,
at 10 o'clock a.m.

BEFORE:

WILLIAM F. CUSICK, Hearing Examiner.

* * * * *

[89]
[Tr. 4]

JAMES PHILIP PASHKOV

was called as a witness and, after being first duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

[BY MR. HIGHSAW:]

* * * * *

Q. By whom are you employed? A. I am employed by the Air
Line Pilots Association International.

Q. What is your position with the Air Line Pilots Association?

[90]
[Tr. 5]

A. My position is that of a negotiator.

Q. Is that your official title? Do you have a title of any kind?

A. I am also referred to as a staff representative, yes, sir.

Q. What are the duties involved in that position? A. My duties
as negotiator are to work with the pilots, preparing their openers, and
negotiate with the pilots in conjunction with the company to conclude an
employment agreement.

Q. By opener you refer to Section 6 notice under the Railway
Labor Act? A. Yes, sir.

* * * * *

Q. Did your duties after January 1, 1959, with the Air Line Pilots Association involve any negotiations or labor relations with Southern Airways? A. Yes, sir.

Q. Specifically what did they involve? A. With respect to Southern and subsequent to January 1, 1959, it involved working with the pilots to prepare the Section 6 opener. That opener was prepared and on July 30, 1959, President Sayen of the association sent to the company that letter with the proposed amendments that the pilots proposed.

Q. Thereafter were you the principal negotiator for the Air Line Pilots Association with respect to the pilots' proposals and discussions with the company? A. That is correct, sir. I might add that for a few meetings there were other individuals that were designated by the association as the principal and individuals.

* * * *

[95]
[Tr. 10]

Q. Mr. Pashkov, so we won't get into any arguments as to whether and what the status of any agreement may be between the Air Line Pilots Association and Southern Airways, I will ask you whether or not on July 30, 1959 there was in existence an agreement, collective bargaining agreement between the Air Line Pilots Association and Southern Airways?

A. Yes, there was.

EXAMINER CUSICK: Will you raise your voice a little, Mr. Highsaw. I don't believe counsel can hear you very well.

MR. HIGHSAW: Yes.

BY MR. HIGHSAW:

Q. I have a document here which I have marked for purposes of identification as ALPA Exhibit 2. Is that a true and correct copy to the best of your knowledge and belief of the collective bargaining agreement which was in effect between ALPA and Southern on July 30, 1959? A. Yes, sir.

* * * *

Q. What was the next step after the adjournment of that meeting of September 24th? A. Well, the next step was actually our application to the National Mediation Board requesting the services of the National Mediation Board.

* * * *

A. No, sir, they only heard our comments.

Q. Let us come to the mediation meeting of January 10th. Where were those conferences held? A. The January conferences were held in Atlanta, Georgia, again at the Georgia Hotel.

Q. Who was the representative of the National Mediation Board present, Mr. Pashkov? A. Mr. James Holeran was present.

Q. You were present at the mediation conference and meeting representing ALPA? A. Yes, sir.

* * * *

Q. After the meetings broke up on January 26 what was the next step, Mr. Pashkov? A. The next step we had was the National Mediation Board sending a letter to both parties to the dispute. The letter was "Proffer of arbitration to the parties."

Q. I show you a copy of a letter from Mr. Thompson of the mediation Board addressed to Mr. Phillips and Mr. Sayen dated February 9, 1960, which I will ask the Examiner to mark for identification as ALPA Exhibit 22 and ask you whether that is a true and correct copy of the letter to which you have just referred. A. That is correct.

EXAMINER CUSICK: The exhibit will be marked for identification as requested.

(ALPA Exhibit No. 22 was marked
for identification.)

BY MR. HIGHSAW:

Q. Now, did ALPA accept or decline that offer of arbitration?

[199]
[Tr. 114]

A. Will you repeat your question?

Q. Did ALPA accept or decline that offer of arbitration? A. This offer was declined, sir.

Q. How was that done, orally, by letter, or how? A. Sir, this was done by letter written by Mr. Sayen to Mr. E. C. Thompson February 16 in which he advised Mr. Thompson of the National Mediation Board declining the proffer of arbitration.

Q. Mr. Pashkov, I show you a document which I will ask the Examiner to mark for identification as ALPA Exhibit 23 which purports to be a copy of a letter from Mr. Sayen to Mr. Thompson dated February 16, 1960. I ask you if that is a true and correct copy of the document to which you just referred. A. Yes, sir; it is.

EXAMINER CUSICK: Let the record show that ALPA Exhibit No. 23 has been marked for identification.

(ALPA Exhibit No. 23 was marked
for identification.)

BY MR. HIGHSAW:

Q. Did you have knowledge of whether the carrier accepted or declined that proffer? A. On this particular date of February 16 we had not.

Q. Did you subsequently have knowledge? A. Yes, sir; we did have subsequent knowledge.

[200]
[Tr. 115]

Q. How did that knowledge come to your attention? A. It came to us in the form of a letter from the National Mediation Board in which

they gave us the letter which the carrier sent to the National Mediation Board as an attachment to the letter which they sent to the association.

EXAMINER CUSICK: I don't think I understood you. Did you say the company refused arbitration?

THE WITNESS: We were advised of the company refusing arbitration, yes.

BY MR. HIGHSAW:

Q. I will show you, Mr. Pashkov, a document which I will ask the Examiner to mark for identification as ALPA Exhibit 23-A, which purports to be a letter from Mr. Thompson to Mr. Sayen and Mr. Phillips stating that Mr. Phillips had declined arbitration on behalf of Southern Airways, dated February 17, 1960, and I ask you is that a true and correct copy of that letter. A. Yes, sir; that is.

* * * *

[220]
[Tr. 135]

Q. What was the next step in the dispute? A. The next step was receipt of a telegram by the association on May 23 from Robert O. Boyd, who is Chairman of the National Mediation Board, addressed to Mr. Sayen.

[221]
[Tr. 136]

Q. What was the sum and substance of that telegram? A. The sum and substance of this telegram is that the National Mediation Board requested the parties to resolve their differences by submitting them to arbitration.

Q. I show you, Mr. Pashkov, a document which I will ask the Examiner to mark for identification as ALPA Exhibit 33 and ask you whether or not that is a true and correct copy of the telegram to which you have just referred. A. Yes, sir.

EXAMINER CUSICK: That document may be marked for identification as requested.

(ALPA Exhibit 33 was marked for identification.)

BY MR. HIGHSAW:

Q. Now, what did ALPA do about that request from the Mediation Board? A. On May 25th the Association, specifically by Mr. Kay McMurray, sent a telegram to the National Mediation Board, specifically Robert O. Boyd, in which it stated, "Reurtel proving arbitration --

EXAMINER CUSICK: I don't believe it is necessary to read this whole telegram. I think it speaks for itself. It is going to be offered, is it not?

MR. HIGHSAW: Yes.

[222]
[Tr. 137]

BY MR. HIGHSAW:

Q. I think we had better, for the purpose of keeping our papers in order, we had better get into the company's actions first. Do you know what the company's response to that request of the Mediation Board was? A. Yes, sir, we do know.

Q. How do you know that? A. We received a letter which Mr. Phillips sent to Mr. Robert Boyd dated May 24th. This letter which Mr. Phillips sent was attached to a letter which Mr. Thompson sent to the association with his letter which was dated June 1, 1960.

Q. What did Mr. Phillips' letter to the Mediation Board do, accept or reject arbitration? A. It rejected arbitration.

* * * * *

[223]
[Tr. 138]

Q. Coming back to what ALPA did about this proffer of arbitration, what did ALPA do? A. In its telegram of May 25th it accepted arbitration.

* * * * *

[225]
[Tr. 140]

Q. Did the strike then take place on June 5th? A. On June 5th at 1800 hours local time, the strike did occur.

Q. Is the strike still in progress? A. Yes, sir.

* * * * *

[229]
[Tr. 144]

Q. Did you personally attend those meetings on July 11 and 12?
A. Yes, sir, I was in Washington.

Q. They were held in Washington?

[230]
[Tr. 145]

A. Yes, sir, at the National Mediation Board offices.

* * * * *

Q. I will show you, Mr. Pashkov, a document which I will ask the Examiner to identify as ALPA Exhibit 42, under the heading ALPA proposal of July 11, 1960, and ask you whether or not that is a true and correct copy of the ALPA proposal which was given to Mr. McMurray?

A. It is, sir.

* * * * *

[232]
[Tr. 147]

Q. As I understand, this represents a complete abandonment of request for duty rig matter? A. That is correct.

Q. Why was that abandoned? A. The pilots have frankly decided the strike had gone on long enough and this represents really their supreme effort to try to cease the strike. The company reported to newspapers things which gave us an impression this was the most objectionable, so in order to conclude the agreement the pilots withdrew this entirely.

* * * * *

[236]
[Tr. 149]

Room 911, Universal Bldg.
Washington, D. C.
Friday, December 2, 1960.

* * *

[239]
[Tr. 152]

Q. Did you communicate with, I believe you said Mr. McMurray was representing the association? A. Yes, sir.

Q. What advice did you give to Mr. McMurray with

[240]
[Tr. 153]

respect to acceptance or rejection? A. We advised Mr. McMurray that we could not accept that offer in view of the last two items which I believe are 5 and 6.

Yes, they are 5, and 6.

Q. What is No. 5? A. No. 5 is seniority of strikers:

"Strikers returning to work will take seniority as it now is. Pilots employed and working are now on priority lists. Strikers fall in behind them."

Item No. 6:

"Company reserves the right to take appropriate disciplinary action, including ineligibility to return to work, in case of pilots employed and working and who have engaged in misconduct, vandalism, assault, et cetera, during strike."

* * * * *

[243]
[Tr. 156]

EXAMINER CUSICK: Mr. Highshaw, I am just not quite clear on this and while we are on this point, it may be

cleared up, but did I understand that the witness testified that this offer was rejected because of 5 or 6 or the other items, one through four were not considered because of five and six?

BY MR. HIGHSHAW:

Q. Will you clarify that for the Examiner? A. Yes.

As best I recall, the committee advised me they could not accept the offer in view of items Nos. 5 and 6, sir.

EXAMINER CUSICK: Those were the only two stumbling blocks, those were the stumbling blocks to the acceptance of the offer?

THE WITNESS: Yes, sir.

EXAMINER CUSICK: The others, one through four, had been considered?

THE WITNESS: Yes, sir.

EXAMINER CUSICK: What were the views of the association as to Nos. 1 through 4?

BY MR. HIGHSHAW:

Q. In other words, what the Examiner is trying to ask you, if five and six had not been in there, what would the committee have done about this? A. In my opinion we would have had an agreement, I am inclined to believe.

Q. In other words, you would have accepted that?

A. I feel quite sure we would have.

* * * *

Q. How does the duration differ from what had previously been proposed?

[268]
[Tr. 181]

A. Mediator Edwards on July 28 in his proposal proposed eighteen months from July 1, 1960, whereas the company's position was two years from date of signing.

Q. The working rules speak for themselves.

Is there any difference on the provision with respect to additional flight crew members? A. That is one of the items, that as I mentioned had been agreed to. Therefore, he did not make this a part of this.

Q. All the other unagreed on items were dropped? A. That is correct, sir.

Q. Now, Mr. Pashkov, what did ALPA do about this offer or proposal? A. After seeing the mediator's proposal which he placed on the board, there was a recess, or, at least, the negotiating committee, and I know I left the room there which was in the Hilton Hotel in Atlanta, we recessed to the room to study it.

The committee after studying it wrote a letter to the mediator on that date.

Q. Did this letter accept the proposal? A. Yes, sir.

Q. Mr. Pashkov, I show you a document which I will ask the Examiner to mark for identification as ALPA Exhibit 48. I ask you if that is a true and correct copy of the letter

[269]
[Tr. 182]

which was prepared by the committee on that day? A. Yes, sir.

* * * * *

Q. Mr. Pashkov, do you know what the company did about this proposal? A. The company submitted a letter, I presume to the mediator, Leverett Edwards, which we received a copy of.

Q. Did you receive a copy of that letter? A. Yes, sir.

Q. From what source did you receive it? A. That letter was received at the Hilton Hotel from Mediator Edwards.

Q. Mr. Pashkov, I show you a document which I will ask the Examiner to mark for identification as ALPA Exhibit No. 49, which purports to be a letter from Mr. Erle Phillips to Mr. Edwards, on July 28, 1960, and I will ask you if that is a true and correct copy of the letter that was handed to you by Mr. Edwards at that time as representing what he had received from Mr. Phillips? A. Yes, sir.

* * * *

Q. What happened then, Mr. Pashkov? A. To my knowledge, sir, after receiving the letter I left the room in which I received this letter which was the room in which we met jointly on July 28.

I left that room, sir.

Mr. Sayen was still in that room.

Q. Did the conferences break off after that date? A. On July 28; yes, sir.

Q. There were no further conferences? A. Not to my knowledge, because I left Atlanta the following day.

Q. Has there ever been any subsequent effort by Southern Airways to revive conferences between Southern and ALPA, to your knowledge? A. Not to my knowledge, sir.

* * * *

CROSS EXAMINATION

BY MR. PHILLIPS:

Q. Mr. Pashkov, you have testified and the record shows that direct negotiations began on September 22, 1959. That is correct, is it not? A. That is correct, sir.

* * * *

[369]
[Tr. 280]

Room 911, Universal Bldg.
Washington, D. C.
Monday, December 5, 1960

* * * * *

[378]
[Tr. 289]

KAY McMURRAY

was called as a witness and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HIGHSAW:

* * * * *

Q. What is your present employment? A. I am employed by the Air Line Pilots Association.

Q. What is your position with the Air Line Pilots Association?
A. It was during this period of time, executive vice-

[379]
[Tr. 290]

president.

* * * * *

[389]
[Tr. 300]

Q. Let me ask you this, Mr. McMurray:
Did Mr. Phillips in his discussions with you on the subject specifically say or give to you any reason as to why the company would not accept the proffer of arbitration at that time? A. I can't recall exactly the dates. I had a number of discussions with Mr. Phillips and on a number of occasions he informed me that he would not arbitrate this case with us simply because he understood we were not asking for things that

other pilot groups didn't have and the arbitrary problem would give them to us. So he would not arbitrate.

* * * *

THE WITNESS: Mr. Phillips said that he realized that the pilots in their requests of the company were not making unreasonable or excessive demands in the other areas and were not asking for things that other similar carriers didn't have

and, therefore, he would not arbitrate with us because he felt the arbitrary would probably give them to us.

EXAMINER CUSICK: He said to you --

THE WITNESS: He said that to me and on a number of occasions.

* * * *

Q. Now, what response did you give to Mr. Thompson on the company proposition contained in ALPA Exhibit No. 43? A. Well, when we saw the last two items which brought into serious focus for the first time the problem of the newly

employed people, when I discussed it with the Pilot Committee it was quite obvious that this was something we could never accept or agree to and that brought to a halt all the discussions.

Q. Are you referring to items 5 and 6 in ALPA Exhibit No. 43?

A. Right.

Q. Did you have any discussion at that time with any representatives of the company on items 5 and 6? A. Yes, after we first saw items 5 and 6 and I discussed it with the pilots, I informed Mr. Thompson that obviously we could not agree to anything like that.

Then he and I reviewed what should be done from that point forward. He suggested that as a last ditch effort perhaps I should go in the room with Mr. Hall and Mr. Phillips to see if we could not arrive at some way of getting around them.

Consequently I had informal discussions that lasted two or three hours with them in a room.

Q. Could you to the best of your recollection tell the Examiner what position you gave to them at that time on this and what their response was to that? A. Once again the discussions were very informal.

Q. When you say informal, you mean people were batting back and forth?

A. Yes, we were sitting reviewing all the problems. Some were in here and some were not in here.

Once again, as I recall, my determined effort was to find any way of getting the carrier to move from any of the fixed positions they had taken for a considerable period of time and recognized the fact that items 5 and 6 just plainly would, in the jargon, blow the fish out of the water, and see if they would not modify them.

Their general answer, after considerable discussion, was that they would not modify them.

Q. Do you recall whether or not they gave you any specific reason for refusing to modify items 5 and 6? A. No, I don't, other than the general feeling arose, I believe their statements generally tended to go around the area that they had hired these people permanently and they were going to keep them.

* * * * *

Q. How did the meetings go on July 11 and 12, how did they break up, Mr. McMurray? A. Well, finally all parties seemed to arrive at

the conclusion that since the carrier felt this way about the newly hired people and they refused to discuss settlement in other areas there was no reason to continue the sessions further.

* * * * *

[397]
[Tr. 308]

CROSS EXAMINATION

BY MR. PHILLIPS:

* * * * *

[413]
[Tr. 324]

Q. Now, then, with respect to the matter of arbitration, do you recall whether Mr. Boyd made a formal or an informal proffer of arbitration or did he simply raise the question of arbitration? A. We had so many discussions on it, Mr. Phillips, and you were there, you know what the problem was, I recall discussing with you, but during the course of our informal discussions, as I recall, I proposed any type of procedure, fact finding, arbitration, anything but what we were headed into. I always met with a solid no as I recall.

Q. As a matter of fact, didn't Mr. Boyd simply throw out this matter of arbitration as a matter of discussion, not formally preferring arbitration?

MR. HIGHSAW: Mr. Examiner, I will stipulate that the formal proffer came afterwards. That was an informal discussion of it.

[414]
[Tr. 325]

EXAMINER CUSICK: Very well.

BY MR. PHILLIPS:

Q. Do you recall in connection with our discussion of arbitration any comment by Phillips or Magill to the effect that the carrier was

reluctant to turn over its business to some college professor who might be selected as an arbitrator. A. I don't recall your using a term as loosely as reluctant. You just said you wouldn't do it.

Q. You don't recall any discussion as to who might be an arbitrator to hear a case? A. In the discussions in the Board offices now?

Q. Right. A. I don't.

Q. Do you recall, Mr. McMurray, if during this discussion that Mr. Phillips was advising his personal opinion or was he saying that the carrier has considered this and this is the carrier's position? A. Now you get into an area that is difficult because as I have previously testified, Mr. Phillips, you and I had informal discussions and I felt that those were private communications much the same as between a lawyer and his client.

EXAMINER CUSICK: I don't think it makes much difference. Mr. Phillips, is it conceded here that you were representing

[415]
[Tr. 326]

the carrier?

MR. PHILLIPS: Yes.

EXAMINER CUSICK: I think that figure you said in the course of these negotiations that were testified to were said on behalf of the carrier, similar so far as anything that was said by any of ALPA witnesses, as their representatives in my opinion was said in behalf of the carrier, irrespective of their personal opinions.

MR. PHILLIPS: I think you are correct. The purpose of the question is that the time and place of this meeting was prior to a formal offer of arbitration. I was asking Mr. McMurray whether he had any recollection or whether I was saying this is what I think, I am going to take it up with my people and when we are asked to do so, we will take an official position.

THE WITNESS: I recall your taking that position with respect to the problem of the duty rig and money, but I don't recall your taking that position with regard to arbitration.

MR. HIGHSAW: While we are still on this question of arbitration and I am not interested in swearing Mr. Phillips as a witness, I will take it as a correct statement of fact, if he says he made the statement which he asked Mr. McMurray, whether he remembered about the company not wanting to turn over their affairs to a college professor arbitrator.

[416]
[Tr. 327]

MR. PHILLIPS: Thank you, sir.

MR. HIGHSAW: Did you make that statement I said I will accept it that you did, if you say you did.

MR. PHILLIPS: I made a statement to that effect, yes, sir.

MR. HIGHSAW: I will stipulate that that was said.

EXAMINER CUSICK: The record will so show.

* * * * *

[421]
[Tr. 332]

[BY MR. DOWNES:]

Q. Mr. McMurray, I want to ask you a few questions just to clear the record.

As of July 11 and 12 meetings, we have just been talking about the items in the company offer -- were any of them of the serious type, a stumbling block other than 5 and 6? A. No. The only serious stumbling block that would prevent a settlement were items 5 and 6.

* * * * *

[422]
[Tr. 333]

Q. The breakup of that series of meetings, July 11 and 12, was, would you say, on this problem, items 5 and 6? A. Right.

Q. You felt there was enough area, you could get together, get to an agreement on the other items? A. I do.

* * * * *

[432]
[Tr. 343]**KAY MC MURRAY**

was recalled as a witness, and having been previously duly sworn, was examined and testified further as follows:

* * * *

[433]
[Tr. 344]

EXAMINER CUSICK: I think Mr. McMurray is the proper one to answer the question, the same question I had of Mr. Pashkov. Mr. McMurray, my understanding really when I asked you was that there would not be an agreement on the company offer of July 12, which is ALPA Exhibit 43, even if Items 5 and 6 were not there.

Then in reply to questions by counsel for the Bureau of Air Enforcement, I believe the record will show you indicated an opinion that you were not far apart on the other items and you probably would reach an agreement. But with Items 5 and 6 they constituted an absolute stumbling block.

THE WITNESS: That is correct.

EXAMINER CUSICK: Now, when those items were first read by you or considered by you, what was your reply, that they would not be considered, that it was an area for discussion or that there wasn't an area for discussion, or was it turned down or left open?

THE WITNESS: After this was handed to me I took it back and reviewed it with the Pilots and, of course, their feeling was, quite naturally, that they could not agree to anything like that.

EXAMINER CUSICK: This was no area for discussion?

THE WITNESS: On these two items, no.

* * * *

[435]
[Tr. 346]

EXAMINER CUSICK: Those items 5 and 6 constituted an absolute

stumbling block in your opinion?

THE WITNESS: It would have to a settlement.

MR. HIGHSAW: There is one thing I am not clear on and that is whether or not Mr. McMurray had any discussions with Mr. Phillips or Mr. Magill on 5 and 6.

THE WITNESS: I had discussions, as I recall, with Mr. Phillips and Mr. Hall. Mr. Magill did not come back up on the July meeting. I believe those were the afternoon of the 12th. It was just done, Mr. Thompson said, "Maybe you can get in the room to discuss them."

So we got in the room and talked two or three hours.

EXAMINER CUSICK: Mr. Phillips, Mr. Hall -- he from the company?

THE WITNESS: Yes.

MR. PHILLIPS: Mr. Hall is vice president of sales and traffic, I believe.

BY MR. HIGHSAW:

Q. To the best of your recollection what did you say to Mr. Phillips and Mr. Hall on 5 and 6, and what did they say to you? A. Well, I tried, I suppose I even tried to make a lecture a time or two as to how this is a poor way to

try to settle a contract, but obviously, our people would not agree to that.

Q. Just say what you told them. A. I told them that this type of problem we could not agree to and we could not get a contract with that request in there. They would never indicate to me anything other than these newly employed people would stay in there and at the top of the list.

* * * * *

Room 725, Universal Bldg.
Washington, D. C.
Tuesday, December 6, 1960

* * * * *

[572]
[Tr. 481]

CLARENCE SAYEN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q. Mr. Sayen, you are president of the Air Line Pilots Association International, are you not? A. That is right.

* * * * *

[593]
[Tr. 502]

Q. And did you attend a meeting in Atlanta on July 27, and July 28?
A. Yes.

Q. Will you tell us who were present at that time? A. Mr. Edwards represented the National Mediation Board and we had the members of the pilots negotiating committee, our staff negotiator, Mr. Pashkov, and myself representing the association and the company representatives were, as I

[594]
[Tr. 503]

recall, Mr. Hulse, Mr. Phillips, and Mr. Hall.

Q. On the first day of the meeting tell us what transpired. A. Mr. Edwards convened the joint meeting almost immediately, set up a conference room, with conference tables and so forth, with copies of the proposed agreement and in outlining his procedure to the parties and indicated he wanted to go through the agreement provision by provision and delineate all of the areas of agreement so as to establish very clearly any areas of disagreement between the parties, to see whether he could narrow this thing down.

Mr. Edwards uses a mediation technique which he calls a red book.

You take an exact copy of the contract itself or the contract proposals and start right from the beginning and go through every provision in the agreement, examine every one and determine whether the parties are in fact -- have an agreement or have a disagreement concerning it.

So he proceeded to utilize this method here and we went through the agreement point by point and he asked when there was no disagreement on a particular clause whether the parties would initial it to indicate that there was an agreement.

We indicated that was satisfactory.

The chairman of the pilots negotiating committee would initial and Mr. Edwards would initial, Mr. Phillips, while indicating he was in agreement declined to initial as I recall.

[595]
[Tr. 504]

Q. Did he give a reason for declining to initial? A. I don't recall his giving any reason. He just didn't do it.

Q. Was this done serum, Mr. Sayen, just as you go through each provision? A. A long tedious process. We went through every provision in the agreement and discussed it, and find any areas of disagreement then between the parties, if there were areas of disagreement, try to narrow them down and agree.

If he could not, set them aside and go to another provision.

* * * * *

[598]
[Tr. 507]

Q. Just one thing, Mr. Sayen, you spoke of before the red book technique. Did he actually "red" out and color the portions of the agreement which were agreed to? A. He did not during that day, but he did the next day. He then took his notes and went through and "redded" it out with red ink. It does not sound like an effective method.

It is a very effective method of mediating. I presume in the

National Mediation files still is this red book with all the redded out sections and the sections that were not agreed upon.

* * * *

Q. Tell us about the second day of the meeting. A. He convened a joint session again on the second day. He had set up a blackboard in the conference room and in convening the session he announced that he was going to, in an effort to assist the parties, he was going to render what he called an advisory arbitration decision on what he would recommend as a settlement between the parties.

He prefaced this by saying he had been an arbitrator for many years and had sat on presidential emergency boards and so forth and he was going to render this arbitration award.

So we put on the blackboard his recommendation on the

[599]
[Tr. 508]

provisions in dispute between the parties.

He brought it down and everybody asked whatever questions they had about it and took notes on it and then he asked the parties to recess and give him a decision.

Q. Mr. Sayen, I show you ALPA's exhibit No. 47 for identification, and ask you whether or not that represents the detail of what Mr. Edwards wrote on that blackboard at the joint meeting on July 28? A. I am recalling it from memory. As I recall it, this is the recommendation on the issues -- I think there were some additional items which he just wrote down, sections so and so denied.

These were ones on which he rendered positive recommendations. Some of the issues he just wrote "denied" on them.

In his opinion the pilots should drop these. These are the ones which he said there should be positive recommendations.

* * * *

[601]
[Tr. 510]

Q. I take it then that Exhibit 47 contains what you describe as the positive proposals being other than those which were denied? A. Yes, generally.

Q. After that was put on the blackboard what next happened? A. As I said, the parties had an opportunity to ask any questions for clarification, what he meant so that it would be clear to both parties, and then he recessed to consider the advisory arbitration award and he requested that they provide him with an answer and that he would like to have the answer on a yes or no basis, either you bought it or you didn't buy it.

Q. Following that did the pilots submit to Mr. Edwards what appears as ALPA's Exhibit 48 for identification?

[602]
[Tr. 511]

A. Yes.

This was the pilot committee's response to the proposal.

Q. Did you receive a response from the company to Mr. Edwards and if so, is it contained in ALPA Exhibit No. 49 for identification?

A. Yes, he showed us a copy of this.

Q. When did you get a copy of this letter from Mr. Phillips addressed to Mr. Edwards dated that day -- was it that day? A. I think it was toward evening of that day.

Q. After you received this response from the company through Mr. Edwards did you have further meetings? A. No further joint meetings with the company. We had some discussions with Mr. Edwards.

Q. In effect the joint sessions broke up and were not resumed?
A. That is right.

* * * * *

[618]
[Tr. 527]

EXAMINER CUSICK: * * * Without bringing the Railway Labor

Act in or your interpretation of it, Mr. Sayen -- I am not testifying for you, but I am trying to help this thing along so that there will be no objection.

You may state the position of the association with respect to paragraph or item 1 of ALPA Exhibit for identification No. 49, to which the question is directed.

THE WITNESS: Point one, the association's position was that this was an illegal and improper injection of an issue, it never had been an issue in the case and it could not be injected now.

That is the first one.

Point two: It was an injection of an issue to which the association could never agree.

We would give up the seniority rights of people who had invested their whole career in this carrier, and had twelve or thirteen years of service, had decided to make their life and career here and were seeking to maintain reasonable and normal standards for pilots comparable to those of other professional pilots by pursuing their legal processes under the law that they should not be deprived of the seniority which they accumulated.

So we considered this was an illegal and improper issue,

[619]
[Tr. 528]

one that was improperly raised and one to which the association could not possibly subscribe.

* * * * *

[623]
[Tr. 532]

BY MR. WEISS:

Q. In fact, as appears from ALPA's Exhibit 25, which is a telegram from yourself to Mr. Thompson dated April 25, 1960, a date for the withdrawal of services was not established until May 4, 1960, is that

correct, sir? A. That is right.

Q. Prior to that time, Mr. Sayen, had there been a proffer of arbitration by the National Mediation Board? A. Yes.

Q. Is it a fact that the association in the instance of that proffer declined the proffer of arbitration? A. That is right.

Q. Will you state briefly the reason for the declination? A. There were no issues involved in this case in our opinion which offered anything new or different, that required any sort of public judgment on them. So that the issues were so narrow in the case, in our view, we couldn't understand why an agreement wasn't reached in collective bargaining.

EXAMINER CUSICK: Had you completed your answer, Mr. Sayen?

THE WITNESS: Well, our feeling was that with the small differences between the parties, the parties should be able to resolve, by collective bargaining, process without resorting to arbitration. The issues involved here had been arbitrated by emergency boards and had been resolved a number

of times. The parties should be able to reach agreement by conferences, by bargaining between themselves.

* * * *

Q. Did you then subsequently receive a request from the National Mediation Board to pull down that date and to engage in further conferences to accomplish an agreement? A. Yes.

Q. And we won't take time because it is a matter of record, but did you accede to that request and pull down your date, did you not?

A. Yes.

Q. Following that action, is it also true that by telegram of May 23, 1960, which is set forth in the record as ALPA's Exhibit 33 for identification, the National Mediation Board again proffered arbitration in this case? A. Yes, sir.

EXAMINER CUSICK: I don't want to cut this short, but I

[625]
[Tr. 534]

think this has all been established, Mr. Weiss, without objection.

MR. WEISS: I am trying to go very rapidly just to get to an ultimate question.

EXAMINER CUSICK: Yes.

BY MR. WEISS:

Q. Did the association on that occasion accept a proffer of arbitration? A. Yes.

Q. Now, my question to which these others have simply been preliminary: what was the reason for accepting arbitration in view of your answer given just a few moments ago, in regard to arbitration? A. While we had felt that arbitration was unnecessary because the issues had been dealt with previously by public judgments on other carriers, in an effort to make an agreement here, to avoid withdrawal from service and everything that goes with it, we sought to persuade the pilot committee, and they agreed, that this matter be submitted to some neutral person who could make an agreement and thereby resolve this particular dispute. We still felt that it was unnecessary, that it still should be possible to settle this by collective bargaining, if there were good faith collective bargaining, but that in an effort to resolve it, we would let somebody else make a judgment as to whether the demands here were

[626]
[Tr. 535]

unreasonable, or what the proper settlement should be.

Q. Following the association's acceptance of that proffer in fact, as the record discloses, the company declined the proffer, did they not? A. Yes, that is correct.

Q. Following that, a date for withdrawal from service was established once more by the association and implemented? A. Yes, quite a time later.

* * * * *

Room 911, Universal Bldg.
Washington, D.C.
Tuesday, December 13, 1960

* * * * *

[726]
[Tr. 631]

WILLIAM S. MAGILL, JR.

was called as a witness and, after having been duly sworn, was examined and testified as follows:

[727]
[Tr. 632]

DIRECT EXAMINATION

BY MR. PHILLIPS:

* * * * *

Q. You are employed by Southern Airways? A. Yes, sir.

Q. What is your position? A. Vice president in charge of operations.

* * * * *

[859]
[Tr. 760]

Wednesday, Dec. 14, 1960

* * * * *

[860]
[Tr. 761]

CROSS EXAMINATION

BY MR. HIGHSAW:

Q. The first question, Mr. Magill, I am asking in this form in order to expedite matters and not ask you a whole series of questions, this refers to page 50 of the transcript of the deposition of Mr. Hulse's taken in Atlanta, Georgia, November 21, 1960, in the case which I referred to yesterday and Mr. Branstetter was questioning Mr. Hulse

[861]
[Tr. 762]

and he asked him the following questions and following answers very brief.

"Question: Who executed or agreed or what department of your company executed or agreed to the contracts with the newly hired pilots? "Answer: We don't have any contract as such. We have a verbal contract if that's what you mean.

"Question: You have a verbal agreement with each pilot? "Answer: Yes. That's with the operation department.

"Question: And that is headed by Mr. Magill. "Answer: That is correct.

"Question: And so he would be the one who would have entered into the agreement with each individual newly hired pilot."

Now the question I would like to ask you, Mr. Magill, is that a correct statement of the situation to which it refers? A. Mr. Highsaw, the responsibility for hiring the new pilots would fall to me. The actual hiring of the new pilots was done by the personnel department under Mr. Martin. Mr. Martin works for me. I did not personally hire the new men.

Q. It is under your general supervision?

[862]
[Tr. 763]

A. Yes.

Q. There is a statement by Mr. Hulse that, "There is no contract as such covering the newly hired pilots but we have a verbal contract with each pilot?" is that a correct statement? A. Yes, sir. We have no labor contract as such.

Q. These verbal contracts, do they differ from pilot to pilot or are they uniform? A. It is my understanding that we hired the men with the same agreement as to what we told them. In other words, they were hired as any group of employees would be for one job. The men were told what the job would be. They would be compensated.

In other words, there were not different contracts signed with each man.

Q. But there was a verbal contract with each man? A. Yes.

Q. Now these verbal contracts with these pilots, Mr. Magill, in these verbal contracts did the company commit itself to give these newly hired pilots seniority over the old ALPA pilots in the event the old ALPA pilots returned to work? A. I don't know, sir.

Q. You don't know? A. I did not know, sir, of any such.

[863]
[Tr. 764]

Q. You never directed Mr. Martin to make any such commitment in hiring these men? A. No, I did not.

Q. If there was such a commitment would you know of it? A. I should know of it.

Q. And you don't know any such? A. No, sir.

Q. All right.

* * * * *

[899]
[Tr. 800]

GRAYDON HALL

was called as a witness and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PHILLIPS:

* * * * *

[900]
[Tr. 801]

Q. You were employed by Southern Airways? A. Yes.

Q. What position? A. Vice-president of sales.

* * * * *

[905]
[Tr. 806]

Q. * * * There has been testimony here that you participated in a meeting in Washington on July 11 and 12, 1960, with Mr. E. C. Thompson,

who has been identified as executive secretary of the National Mediation Board. Is that correct? A. Yes, sir.

Q. In what capacity did you attend this meeting in Washington?
A. I attended as an officer of the company and as a representative for the company in these mediation sessions, sir.

Q. What was your authority as a representative of the company?
A. I had authority to assist Mr. Phillips with the negotiations, to sign a contract or to do whatever we felt was right and proper in the interest of the company.

Q. From whom did you get that authority? A. From Mr. Hulse.

* * * * *

[938]
[Tr. 839]

[CROSS EXAMINATION]

BY MR. HIGHSAW:

Q. The question I asked you, Mr. Hall, is, are you stating that Mr. McMurray did not make any effort to get the carrier to modify or eliminate their offer of July 12, Items 5 and 6? Item 5 related to the seniority of strikers and Item 6 related to the question of disciplinary action.

[939]
[Tr. 840]

EXAMINER CUSICK: What do you mean by "Make any effort"?

MR. HIGHSAW: I mean did he request you do?

THE WITNESS: May I answer this the way I view it as to what actually happened. He said without 5 and 6, with the company having those two proposals there could be no settlement. That was his position.

* * * * *

[943]
[Tr. 844]

Q. When you and Mr. Phillips got together on the night of the 11th and formulated Item 5 relating to seniority of strikers why did you not

come up with the proposal that you just mentioned instead of the proposal that all strikers returning to work would take the seniority list as it now is? A. We made this proposal here because the Union had made the exact opposite proposal. We did not as a matter of policy propose any compromise at that time.

* * * *

[945]
[Tr. 846]

Q. In these discussions that you had with the company

[946]
[Tr. 847]

officers on this subject matter of Item 6, had there been any discussion among you at all or mention among you at all of the possibility that if the ALPA strikers returned to work any disciplinary action the company thought appropriate could be processed under the disciplinary provisions of the ALPA agreement? A. Yes, sir; that has been discussed.

Q. What has been your conclusions about that? A. Our conclusions, at least my conclusion was that a result of the discussions was that that is often times a lengthy and very often times an unsatisfactory solution to the company's problem.

Q. Why is it unsatisfactory? A. Well, it is just that you are not able to obtain the result that you might want with the particular employe.

Q. You mean you ultimately have to submit this matter to a neutral arbitrator to decide it and he may decide against the company?

* * * *

[951]
[Tr. 852]

EDWARD L. MARTIN

was called as a witness, and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PHILLIPS:

* * * * *

Q. You are employed by Southern Airways? A. Yes, sir.

Q. What is your job, please, sir? A. I am Director of Personnel.

* * * * *

[955]
[Tr. 856]

Q. There has been testimony here that there was a strike on June 5, 1960. Following that strike did you have the responsibility for hiring replacement pilots? A. Yes, sir.

* * * * *

[961]
[Tr. 862]

Q. Now, then, Mr. Martin, were any of these replacement pilots hired pursuant to written contracts? A. No, sir.

Q. On what basis were these pilots hired then? A. Well, they were hired like anyone else that we would hire, our station agents or our clerical people. They are employed for a job. There is no contract involved.

Q. No written contract? A. No written contract.

Q. Were these replacement pilots told that their jobs were temporary? A. No. We told them all that we thought it was going to be permanent; however, something could come about in a situation like that, but we thought it would be permanent,

[962]
[Tr. 863]

but something could happen.

Q. Mr. Martin, during the period January to June 1960, you testified, I believe, and your Southern Exhibit 3 reflects that certain probationary pilots were hired. A. Yes, sir.

Q. Did you have occasion to have conversations with the probationary pilots individually or collectively? A. Yes, sir, both. We had many conversations, especially with that group of people, and I had discussions.

Q. Well, did the probationary pilot group evidence any concern over the then pending dispute between ALPA and Southern? A. Yes, sir. I believe it was after the January meeting they were concerned about, well, what's going to happen if the pilots strike? I'd say it was hitting them in the job security portion of their thinking.

Q. Well, did you give the same response to anyone who questioned you regarding the situation? A. I tried to, yes, sir.

Q. And what was that? A. Well, first, we'd say, "Well, don't worry about it because these negotiations from what we understand go on for a long time and there is nothing we can do about it. Let's wait and see what the situation is." And during the early part of that year that was sufficient. As we got down

toward, I guess April and May, there were many more questions from these employees and they would come in and ask me, "Well, what do you think is going on? What is the status of the negotiations?" And on occasions I would tell them what I had heard to be the status. That the company had made an offer in January, which I think we showed most of them, and that there were meetings, that there were meetings with the mediator, and the best they could do was just sit tight.

* * * *

[BY MR. DOWNES:]

Q. You were asked before whether you had a written contract guaranteeing employment or guaranteeing certain seniority in the event

of strike and so forth subsequent to June 6.

My question is: Before June 6 or after June 6, did you have any obligation or understanding in regard to employment, duration or anything like that? A. If you talk specifically about probationary pilots, that is, new pilots, no, we did not have any agreement. We told them that they were on a probationary status for the first year of their employment. That is part of their orientation when they go on the payroll.

Q. You get a co-pilot after June 6. You hire a co-pilot.

He is a probationary employee? A. Yes, sir.

Q. And he would be a probationary employee for a year, is that right? A. Yes, sir.

Q. And, as such, the company could let him go at will somewhat, when he is on probation, as far as the company is concerned? A. Yes, sir, that is my understanding of it.

Q. Is it your opinion that after the strike began on June 5 and you started using the normal employment practices of acquiring new people, it was or was not necessary to make any commitments as to duration of employment with these new people? A. No, sir, we did not make a commitment as to duration, as I said before. We told them we thought it was going to be permanent. That depended on their ability, if they could qualify for their job. It depended on their ability and the way they performed. We thought it was going to be permanent; however, something could always happen.

* * * * *

[BY MR. HIGHSAW:]

Q. Now, with respect to this last answer which you gave to Enforcement Counsel, as a part of these oral contracts that were entered

into with each individual pilot, did you on behalf of Southern or anyone else that you know of promise these pilots or make it a part of the agreement that they would be given seniority ahead of any returning ALPA pilots returned? A. No, sir, we didn't enter into expressions like that.

Q. Made no such commitment? A. We made the commitment to this degree: that we

thought it was going to be permanent. If we hired a man as a captain he was going to stay as a captain. If we hire him as a co-pilot, he was going to stay as a co-pilot, that something could always happen. We didn't know. Maybe he wasn't qualified.

Q. Did any of these pilots, after June 5 and the period up to July 28, during which you were busy hiring, ask you what would happen to their positions if the strike were settled and the ALPA pilots returned? A. Yes, sir, they asked us.

Q. Would you say a few, or quite a few, or most of them? A. Again, you are kicking my memory about. I remember that I was asked. It wasn't one. It wasn't one hundred fifty. I was asked.

Q. More than one? A. Yes, sir.

Q. What did you tell them when you were asked that question? A. The same thing I just said; again we thought it was going to be permanent.

Q. You made no reference at all to the status of the returning ALPA pilots in case they returned? A. No, sir.

* * * * *

Q. I am now talking about after June 6, Mr. Martin.

[1023]
[Tr. 925]

As I understand it, the pilots you hired on and after June 6 under the individual arrangements you have with them are probationary pilots for six months; is that correct? A. No, sir.

EXAMINER CUSICK: Captain, isn't it?

THE WITNESS: Captains are for six months, co-pilots are for twelve months.

BY MR. HIGHSAW:

Q. For twelve months? A. Yes, sir.

Q. With respect to a co-pilot during that twelve month period, he is a probationary co-pilot and as far as your contract with him goes you can fire him? Is that right? A. Yes, sir, I assume we could.

Q. And the same is true with respect to your probationary pilots for six months? I am speaking on and after June 6th? A. Captains?

Q. I mean captains. A. Yes, sir.

* * * * *

[1118]

January 3, 1961

NOTICE TO ALL PARTIES:

By agreement of all parties the hearing in this case presently scheduled to reconvene on January 9, 1961, is hereby postponed until January 17, 1961. On the latter date the hearing will reconvene at 10 a.m. (eastern standard time) in Room 803, Universal Building, Connecticut and Florida Avenues, N.W., Washington, D.C.

/s/ William F. Cusick
Hearing Examiner

[1121]
[Tr. 1018]

Tuesday, January 17, 1961

* * * * *

[1164]
[Tr. 1062]

FRANK W. HULSE

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. PHILLIPS:

* * * * *

Q. You are President of Southern Airways, Incorporated? A. Yes, sir.

* * * * *

[1185]
[Tr. 1083]

A. Well, the company had employed the new pilots, there were nearly a hundred on the payroll at that time. They had been employed in good faith, they had maintained service for the public during this difficult period and we certainly didn't think we could kick them out under the circumstances.

* * * * *

[1186]
[Tr. 1084]

Q. Now, Mr. Hulse, there has been testimony here that

[1187]
[Tr. 1085]

Southern has refused arbitration on each occasion. Was the decision to decline arbitration your decision? A. Yes, after extensive discussions with Magill and Phillips and seeking their advice and counsel, I assumed the responsibility of not accepting arbitration.

Q. Can you state to the Examiner your reasons for refusing arbitration? A. Well, the issues were entirely too broad for arbitration. We still had a great many unresolved items. It would have been surrendering management prerogatives to follow this course. We were

[1250]
[Tr. 1143]

55

very much concerned about subsidy and it had been our experience in the past that arbitrators had little regard for cost in settling issues.

Q. It is correct, that one occasion previously, Southern did arbitrate a contract with ALPA? A. Yes, sir.

* * * *

[1220]
[Tr. 1115]

RECROSS EXAMINATION

BY MR. HIGHSAW:

MR. HIGHSAW: Before Mr. Hulse gets off the stand, Mr. Phillips, I would like to clarify one point.

He referred, in testifying, I think my notes show as to the reasons for rejecting arbitration, he referred to a prior arbitration between Southern and ALPA over a contract arrangement.

May I ask you, Mr. Phillips, is that the arbitration which ALPA Exhibit 47 covers?

MR. PHILLIPS: Yes, sir.

Is that the Sol Wallen situation?

[1221]
[Tr. 116]

MR. HIGHSAW: Yes, he was chairman of that arbitration board.

* * * *

[1249]
[Tr. 1142]

Room 803, Universal Bldg.
Washington, D. C.
Wednesday, January 18, 1961

The above-entitled matter was resumed for hearing, pursuant to recess, at 10 o'clock a.m.

* * * *

[1250]
[Tr. 1143]

ERLE PHILLIPS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

MR. HIGHSAW: Mr. Examiner, before the witness testifies, I would like to make a brief statement for the record.

The appearance of an attorney to be one of the principal witnesses for a client after he has performed throughout most of the proceeding as principal attorney for the client creates a problem that in so far as I am aware is a novel one with respect to the board.

However, it is not a novel one with respect to the courts and there has been a great deal of law on the subject.

So that our position is clear beforehand, and not after the fact, I would like the record to show that our position is, one, that testimony by this witness under the circumstances

[1251]
[Tr. 1144]

of the case involves a violation of the board rules of practice and the principles of law.

* * * * *

[1253]
[Tr. 1146]

DIRECT EXAMINATION

BY MR. BEASLEY:

* * * * *

Q. Are you a lawyer and member of the firm of Fisher and Phillips in Atlanta?

[1254]
[Tr. 1147]

A. That is correct, sir.

Q. Will you state briefly your association with Southern Airways?

A. My firm has been representing Southern, I would say, for approximately eight years in the field of labor relations.

* * * * *

Q. Mr. Phillips, you are the Mr. Phillips to which reference has been made throughout this particular proceeding, are you not? A. That is correct, sir.

Q. Now, directing your attention to the first negotiating session which was held, starting on September 22, in what capacity did you attend that negotiating session? A. My capacity was the same as it had been in prior

[1255]
[Tr. 1148]

negotiations with these various organizations. I think it would be fair to say that I acted as chief negotiator for the company.

Actually, Mr. Magill and I -- Mr. Magill being vice-president of operations of Southern -- constituted the two principal members of the committee.

At other times we had other persons with us, but I was there as a contract negotiator for Southern.

* * * * *

[1292]
[Tr. 1185]

Q. The next meeting, I believe, you said with Mr. Edwards was on July 27, is that correct? A. Yes, sir.

Q. What happened at that time? A. This was another meeting in Atlanta at the Hilton Motel and in Mr. Edwards' room. My recollection is that we met Mr. Edwards privately --

Q. Who are we? A. Excuse me, Mr. Hulse and Mr. Hall and I. Then, some time that morning we went into a motel room, it may have been his room, I guess it was his room, and met with the pilot committee. Mr. Pashkov was there and Mr. Sayen was there. Now, at this meeting Mr. Edwards stated that he wanted to determine where the parties stood.

ALPA had a manual or book which I believe consisted of the old contract on one side and perhaps proposals on the other side. Mr.

Edwards said that it was his purpose to go through this book item by item and see which items were in

[1293]
[Tr. 1186]

dispute, that we would then initial these things, and that he would take Mercurochrome and ink out those portions about which there was no dispute.

I didn't like the mechanics of his procedure and stated that I would not participate in that particular procedure. I may have used the word "childish"; I used some such derogatory remark to indicate my disapproval, but I did state, if I had my own notes and I knew where he stood, I would be glad to signify my position. So the procedure was carried out; he would read a section and Mr. Pashkov, I believe, acted as spokesman for the Association, would indicate whether this was in issue; I would indicate our position. Mr. Edwards would initial it, someone from the Association would initial it, and he would take the Mercurochrome out and I think paint it out. So that took a considerable length of time.

Sometime during that day, Mr. Edwards stated that he proposed to render an advisory arbitration award which would not be binding on the parties, but which would attempt to dispose of the economic issues of this dispute.

We recessed, I believe, and my best recollection is that we met again the following morning in the same room, at which time and place he had a blackboard. There was a lot of window dressing on his part, but essentially he wrote on the blackboard his recommendations for disposing

[1294]
[Tr. 1187]

of the economic issues between the parties. A summary of his advisory arbitration award has been introduced in evidence as ALPA Exhibit 47.

Following this, there was another recess and before recessing, he asked the parties to advise him later that day as to their position. I met

with Mr. Hulse, Mr. Hall, in Mr. Hulse's office. Mr. Hulse was leaving town; we discussed the matter thoroughly, and I was instructed to write Mr. Holloran a letter stating the position of the carrier. I wrote him such a letter, dated July 28, 1960, which has been introduced in evidence as ALPA Exhibit 49.

We met with Mr. Edwards and he advised us some time during that afternoon that the ALPA Committee had accepted his proposal and that letter I think has been introduced in evidence as ALPA Exhibit 48.

* * * *

[CROSS EXAMINATION]

[BY MR. HIGHSAW:]

Q. Now, coming down to this matter of the July 28 meeting, and the matter of going through the books and marking them that you have testified about, beginning on page 30 of the transcript of your deposition, Mr. Branstedder started questioning you:

"Question: On the 28th of July, in Atlanta, 1960, when the non-binding advisory arbitration award was submitted by the Mediation Service, I will ask you if Mr. Leverett Edwards did not sit down with you -- was Magill present -- or were the negotiators, with the defendant, Southern, and say, 'Let us check what matters we can agree in,' and you told him you were not interested in negotiating further and you were not interested in checking off anything? "Answer: This is July 28?

"Question: Yes, July 28. "Answer: I don't recall. Let me say this: We had a conversation and I am sure that I told Lev Edwards words to this effect: that I thought it would be an utter waste of time to continue talking about each item in the ALPA

proposal. That we had been talking about those since September and I saw no need to waste a lot of time going back over and plowing the same ground that had been plowed four or five times before.

"Question: And you refused, at the request of the mediator, and as negotiator for the company, to check those things --

"Answer: I recall now what you are talking about. ALPA had a booklet of some kind, there, listing their contract proposals and Lev wanted to go through that in what I thought was a schoolboy's procedure and everybody put initials on the ALPA book, and I told him I didn't care to put my initials, and someone for ALPA put their initials on the book, but I said I thought it was childish, unnecessary, and didn't care to do it. That is correct."

Now, the question I have to ask you is if I have correctly read your testimony on that point from pages 30 and 31 of the transcript of the deposition. A. Yes, sir.

* * * *

[1318]
[Tr. 1211]

CROSS EXAMINATION
BY MR. DOWNES:

* * * *

[1333]
[Tr. 1226]

Q. I just have two more questions. Going on next to the July 11 and 12 meeting, that is Exhibit 43, with the provisions in items 5 and 6 -- item in regard to seniority of the strikers and item 6 in regard to discipline.

[1334]
[Tr. 1227]

Now, the question is: Didn't the company, or didn't you recognize that at that particular time that would be unacceptable to the association?

A. No, I didn't know for sure.

* * * *

There was an area perhaps of compromise on the part of

[1335]
[Tr. 1228]

the company but I don't think from ALPA's standpoint -- and that was to eliminate probationary pilots who had no status under the contract, you see.

We had a considerable number of probationary pilots -- well, the probationary pilots under the contract were pilots with less than a year's service. There were a lot of those people.

It was our feeling that technically they had no rights under the contract. The only area of compromise which occurred to us was that if those pilots were replaced by the pilots who had been hired the matter might be settled.

We had in Mr. Boyd's office Mr. Hall and I raised the question briefly with Mr. McMurray. I did not make it a formal offer. I raised the question, what would ALPA do -- suppose we settled this matter and we fired all the probationers, what would be your position?

His response as I recall it is you just could not do that and we would not countenance that.

We didn't explore it in detail, but it was mentioned.

EXAMINER CUSICK: Who was present?

THE WITNESS: Mr. McMurray, Mr. Hall, myself, and perhaps Mr. Boyd was in the room. I can't remember. The four of us were together. At various times Boyd was not there.

EXAMINER CUSICK: The date of this was what?

THE WITNESS: This was on July -- it would not have been Mr. Boyd -- Thompson was meeting with us in July, but Mr. Hall

[1336]
[Tr. 1229]

and I represented Southern.

Mr. McMurray represented ALPA. Eugene Thompson was the secretary of the board.

EXAMINER CUSICK: This was the meeting subsequent to the strike?

THE WITNESS: Yes, sir; July 12.

[1402]
[Tr. 1295]

EXAMINER CUSICK: On the record.

In view of the off-the-record discussion, it was agreed by all parties and Examiner in this case that briefs will be filed not later than March 31, 1961.

Are ther any motions or any other matters that parties would like to bring up at this time? If there is nothing further, the hearing in this case is adjourned.

(Whereupon, at 5:15 o'clock p.m., the hearing in the above-entitled matter was adjourned.)

[1434]

A.L.P.A. EXHIBIT NO. 3

July 30, 1959

Mr. Frank W. Hulse, President
Southern Airways, Inc.
Atlanta Airport
Atlanta, Georgia

Dear Mr. Hulse:

This letter is to notify you in accordance with Section 36 of the Pilots' Employment Agreement between Southern Airways, Inc., and its pilots as represented by the Air Line Pilots Association, International, effective July 1, 1958, that your pilots wish to make certain changes in the said Pilots' Employment Agreement in accordance with the provisions of Section 6, Title I, of the Railway Labor Act, as amended.

The changes which the pilots are proposing at this time are outlined in the attached proposed Amendment to their Pilots' Employment Agreement.

In addition, your pilots also desire to negotiate certain changes in the Pilots' Retirement Plan.

We suggest that negotiations begin at 10:00 A.M. on August 11, 1959 in your offices in Atlanta. If this date is not agreeable to you, would you nominate a date and suggest a time and place when conferences can be held in accordance with the provisions of Section 6, Title I, of the Railway Labor Act, as amended.

Sincerely yours,
AIR LINE PILOTS ASSOCIATION

CNS/dr
Enclosure

Clarence N. Sayen, President

bc: SOU Negotiating Committee
R. T. Brown, Master Chairman

[1807]

54

[1807]

A.L.P.A. EXHIBIT NO. 34

NATIONAL MEDIATION BOARD
WASHINGTON

June 1, 1960
Case No. A-6102

Mr. Erle Phillips
Fisher, Phillips & Allen
Suite 1410 Rhodes-Haverty Building
Atlanta 3, Georgia

Mr. Clarence N. Sayen, President
Air Line Pilots Association
55th Street & Cicero Avenue
Chicago 38, Illinois

JUN 3 1960 [Stamp]

Gentlemen:

Reference is made to our telegram dated May 23, 1960 addressed jointly to Mr. Frank W. Hulse, President of Southern Airways, Inc. and Mr. C. N. Sayen, President of the Air Line Pilots Association signed by Chairman Boyd urging both parties to again consider submitting the dispute covered by NMB Case No. A-6102 to arbitration under the Railway Labor Act. We are now in receipt of replies from both parties to that telegram.

We are sending herewith to Mr. Phillips copy of telegram dated May 25, 1960 from Mr. Kay McMurray, Executive Vice President of the Air Line Pilots Association, and to Mr. Sayen copy of Mr. Phillips letter to Chairman Boyd dated May 24, 1960. The contents of these communications are self-explanatory.

Very truly yours,

/s/ E. C. Thompson
Executive Secretary

4-ctm

ENCLOSURE:

[1808]

65

[1808]

A.L.P.A. EXHIBIT NO. 34A

Law Offices
FISHER, PHILLIPS & ALLEN
Suite 1410 Rhodes-Haverty Building

* * *

* * *
Atlanta 3, Georgia

May 24, 1960

Mr. Robert O. Boyd, Chairman
National Mediation Board
1230 16th Street, N. W.
Washington 25, D. C.

Dear Mr. Boyd:

Frank W. Hulse, President of Southern Airways, Inc., is out of town this week in connection with some urgent business matters and has asked that I acknowledge receipt of your telegram to him dated May 23, 1960.

Mr. Hulse has carefully considered your request that Southern agree to arbitrate the existing dispute with the Air Line Pilots' Association and has attempted to evaluate the Carrier's obligations under the Railway Labor Act and its various duties and obligations to the public.

After a thoughtful consideration of all of the factors involved, the Carrier must respectfully decline to arbitrate this dispute.

I do want to express to you and the members of your staff our deepest appreciation for the courtesies and consideration you have given us. Certainly, you have exerted your very best efforts in attempting to resolve this dispute and I know of no one who could have accomplished more.

Sincerely,

/s/ Erie Phillips

EP:eb

cc: Mr. Frank W. Hulse
Mr. Bill Magill

Via Air Mail

[1809]

56

[1809]

A.L.P.A. EXHIBIT NO. 35

WESTERN UNION

MAY 25, 1960

ROBERT O. BOYD
NATIONAL MEDIATION BOARD,
WASHINGTON, D. C.

REURTEL PROFFERING ARBITRATION SOUTHERN AIRWAYS DISPUTE ASSOCIATION STILL OF VIEW APPROPRIATE SOLUTION COULD BEST BE ATTAINED CONFERENCE TABLE WITH COMPANY BARGAINING IN GOOD FAITH IN ACCORDANCE WITH STATUTORY REQUIREMENT. IRRESPECTIVE THIS OPINION ASSOCIATION COGNIZANT ITS RESPONSIBILITIES UNDER LAW AND TO PUBLIC AND ACCORDINGLY ACCEPTS ARBITRATION PROPOSAL YOUR TELEGRAM. WILL AWAIT FURTHER WORD FROM YOU RE COMPANY POSITION OR NECESSARY DISCUSSIONS ARBITRATION AGREEMENT.

KAY McMURRAY, EXEC. V.P.
AIR LINE PILOTS ASSOCIATION

[1817]

A.L.P.A. EXHIBIT NO. 43COMPANY OFFER

July 12, 1960

- (1) Pay Scale (8th year captain - 1/2 day - 1/2 night - 85 hrs.)

7-15-60	<u>DC-3</u>	<u>M404 or CV240</u>
7-15-61	\$1246.00	\$1483.00
	1321.00	1558.00

- (2) Copilot Pay

1st year (7-15-60)	\$425.00	7-15-61	\$450.00
2nd year "	475.00	7-15-61	500.00
3rd year "	42%		
4th year "	47%		
5th year & thereafter	52%		

- (3) Working Rules:

(a) Section 14 (a) Full pay and credit for deadheading for pilots with more than two years service.

(b) Section 15 (b) One hour pay and credit for pilots with over two years service who are called to airport to fly or who report for scheduled flight duty and fail to fly.

(c) Section 18 (4) Add: "and in no case less than his minimum guarantee."

(d) Section 18 (8) One month's written notice regarding vacation period.

(e) Section 34 (a) 260 hours sick leave accumulation.

- (4) Duration - 2 years from date of signing

(5) Seniority of Strikers-Strikers returning to work will take seniority list as it now is. Pilots employed and working are now on priority list and strikers would fall in behind them.

(6) Company reserves right to take appropriate disciplinary action, including ineligibility to return to work, in case of pilots employed and working and who have engaged in misconduct - vandalism, assault, etc., during strike.

[1820]

68

[1820]

A.L.P.A. EXHIBIT NO. 45

CALL LETTERS	KGL DL-PD	CHARGE TO	AIR LINE PILOTS ASSOCIATION-CHICAGO
--------------	-----------	-----------	-------------------------------------

JULY 25, 1960

E. C. THOMPSON, EXECUTIVE SECRETARY
NATIONAL MEDIATION BOARD
WASHINGTON, D. C.

RETEL JULY 25 SOUTHERN CASE, ASSOCIATION WILL ATTEND
AND BE REPRESENTED BY C. N. SAYEN.

CLARENCE N. SAYEN, PRESIDENT
AIR LINE PILOTS ASSOCIATION

[1823]

A.L.P.A. EXHIBIT NO. 47

MEDIATOR'S JULY 28, 1960 PROPOSAL
FOR SETTLEMENT OF DISPUTE

<u>PILOT PAY</u>	<u>DC-3</u>	<u>M-404</u>
		<u>CV-240</u>

Effective 8-1-60	\$1246	\$1483
Effective 5-1-61	1321	Effective 8-1-61..... 1558

COPILOTS

Effective 8-1-60	1st yr	425	Effective 5-1-61..... 450
	2nd yr	475	Effective 5-1-61..... 500
	3rd yr	42%	
	4th yr	47%	
	5th yr	52%	

On meal allowance-increase dinner allowance \$.25 to \$2.75

PENSIONS -

Company pick up "A" Fund and such cost to be reflected in adjustment of pilot pay.

DURATION -

18 months from July 1, 1960.

ADDITIONAL FLIGHT CREW MEMBERS -

Company will give letter to Association that it will negotiate this issue when it arises.

WORKING RULES -

As proposed in Company offer of July 12, 1960.

This proposal was accepted by Committee. The Company accepted this proposal, but its position on duration of Agreement is two years from date of signing.

[1824]

A.L.P.A. EXHIBIT NO. 48

A L P A

Air Line Pilots Association
55th Street & Cicero Avenue
Chicago 38, Illinois
Portsmouth 7 - 1400
Affiliated with A.F.L.-C.I.O.

July 28, 1960
Atlanta, Ga.

Mr. L. Edwards

The Southern pilots' Negotiating Committee has considered your proposal which you reduced to writing on the blackboard in room 148 at the Hilton Inn on Thursday, July 28, 1960. This Committee believes that your proposal falls short of the pilots' desires in as much as the Southern pilots' desires for improvement in working conditions are currently being afforded to pilots of other comparable airlines, however, in order that this dispute can now be resolved, this Committee accepts your proposal.

/s/ Clifton Miller
Chairman of Southern Negotiating
Committee

[1825]

70

[1825]

A.L.P.A. EXHIBIT NO. 49

July 28, 1960

Honorable Leverett Edwards
Member
National Mediation Board
Washington, D.C.

Dear Mr. Edwards:

On Thursday, July 28, 1960, in a joint conference with representatives of Southern Airways, Inc. and representatives of A.L.P.A., you rendered what you termed an "advisory arbitration award" designed to settle the economic issues between A.L.P.A. and Southern.

Please be advised that Southern Airways, Inc. accepts in principle your award, subject to execution of an agreement disposing of all issues between Southern and A.L.P.A., except insofar as it pertains to duration. Southern's position is that the contract should continue in effect for two years from the date of execution.

Southern's acceptance of your advisory award is made without prejudice to its position concerning the following matters:

- (1) Seniority - Nearly 100 pilots have been employed since the strike began, and we require only about 40 additional pilots. We are willing to return to service as many of the strikers as our needs dictate, but their seniority will date from the date on which they return to work.
- (2) Disciplinary Action - Southern reserves the right to take disciplinary action, including ineligibility to return to service, in the case of pilots who have engaged in misconduct during the strike.
- (3) Parking Aircraft - Any agreement finally executed would have to provide for pilots' parking and moving aircraft.

We appreciate your mediatory efforts and your patience in handling this dispute.

Sincerely,
SOUTHERN AIRWAYS, INC.

/s/ Erle Phillips
Attorney

[1834]

A.L.P.A. EXHIBIT NO. 57

NATIONAL MEDIATION BOARD

In the Matter of:	:	ARBITRATION OPINION
SOUTHERN AIRWAYS, INC.	:	
ATLANTA, GEORGIA	:	
and	:	Arbitration No. 197
AIR LINE PILOTS ASSOCIATION,	:	Case No. A-4363
INTERNATIONAL	:	

The above parties signed an arbitration agreement on April 5, 1954 and an amendment thereto on November 24, 1954, in accordance with the Railway Labor Act, creating a Board of Arbitration of three members to make a final and binding determination of the specific questions enumerated in the proposition submitted by the Association to the Carrier and marked Exhibit A in the arbitration agreement. The party members of the Board of Arbitration were designated by the parties and the neutral was designated by the National Mediation Board on August 26, 1954. Paragraph Eighth of the arbitration agreement was waived and hearings were held in Atlanta, Georgia on November 22, 23 and 24, 1954 at which time the neutral member was elected Chairman of the Board and evidence and testimony on the issues in dispute was taken. Paragraph Ninth of the arbitration agreement was waived by the parties (Transcript, p. 579) and the Board of Arbitration met in New York City on January 11, 12 and 13, 1955 and arrived at a unanimous decision.

* * * * *

[1855]

A.L.P.A. EXHIBIT NO. 60NATIONAL MEDIATION BOARD
WASHINGTON

In the matter of	:	
REPRESENTATION OF EMPLOYEES	:	CASE NO. R-2410
of the	:	Certification
SOUTHERN AIRWAYS, INCORPORATED	:	June 18, 1951
Pilots and Copilots	:	

The services of the National Mediation Board were invoked by the Air Line Pilots Association, International, to investigate and determine who may represent for purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, pilots and copilots, employees of the Southern Airways, Incorporated.

At the time application was received, these employees were not represented by any organization or individual.

The Board assigned Mediator C. E. Hurley to investigate and after finding that a dispute existed among the employees concerned, directed him to conduct an election by secret mail ballot to determine their choice.

Following is the result of an election as reported by Mediator T. A. Tracy, who was assigned to count the ballots in this case and attested to on June 11, 1951, by a representative of the applicant organization who acted as observer:

Number of Employees Voting:

Air Line Pilots Association, <u>International</u>	: Void	: Number
	: Bal-	: Eligible
	: lots	: Voters
Pilots and Copilots	49	6
		61

FINDINGS AND CERTIFICATION

The National Mediation Board upon the whole record and the report of the mediator finds that the carrier and the employees in this case are respectively a carrier and employees within the meaning of

the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein and that the interested parties were given due notice of investigation whereupon the National Mediation Board certifies that:

The Air Line Pilots Association, International, has been duly designated and authorized to represent for purposes of the Railway Labor Act, the craft or class of pilots and copilots, employees of the Southern Airways, Incorporated, its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

Thomas E. Bickers
Secretary

[1858]

A.L.P.A. EXHIBIT NO. 61

SOUTHERN AIRWAYS, INC.	:	
v.	:	NUMBER A-81199
AIRLINE PILOTS ASSOCIATION,	:	FULTON SUPERIOR COURT
INTERNATIONAL	:	

ANSWER AND CROSS-BILL

Comes now Air Line Pilots Association, International, and for answer and cross-bill for injunction respectfully shows the Court the following:

* * * * *

[1913]

74

[1913]

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

SOUTHERN AIRWAYS, INC.,)	
a corporation,)	
Complainant,)	
vs.)	
AIR LINE PILOTS ASSOCIATION,)	NO. 62719-1 R.D.
INTERNATIONAL, an unincorporated)	
association, LOCAL COUNCIL NO. 74,)	
AIR LINE PILOTS ASSOCIATION, an)	
unincorporated association,)	
JAMES T. HARPER, and A. L. HILL,)	
Defendants.)	

ORIGINAL BILL FOR INJUNCTION

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT
OF SHELBY COUNTY, TENNESSEE:

Comes the complainant, Southern Airways, Inc., and respectfully alleges and would show unto the Court as follows:

* * * * *

[1950]

SOUTHERN EXHIBIT NO. 2

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SOUTHERN AIRWAYS, INC.	:	NO. 6942
V.	:	
AIR CARRIER MECHANICS ASSOCIATION,	:	CIVIL ACTION
INTERNATIONAL	:	

* * * * *

[1989]

[Rec'd Mar. 17, 1961 -CAB]

**BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.**

* * * * *

IN THE MATTER OF COMPLIANCE *
WITH TITLE IV, SECTION 401 (f) *
AND 401 (k) OF THE FEDERAL *
AVIATION ACT OF 1958 BY *
SOUTHERN AIRWAYS, INC. *

DOCKET NO. 11654

* * * * *

BRIEF OF SOUTHERN AIRWAYS, INC.

[1990]

I N D E X

	<u>PAGE</u>
AUTHORITIES CITED	... iii
PRELIMINARY STATEMENT	... 1
ISSUE - Did the Carrier Exert Every Reasonable Effort to Make and Maintain an Agreement With Air Line Pilots Association?	... 2
POINT ONE -	
The Carrier Has Not Violated Its Obligation to Negotiate in Good Faith as Prescribed by the Railway Labor Act	... 3
STATEMENT OF FACTS	... 3
ARGUMENT AND CITATION OF AUTHORITY	... 23
(1) During the Negotiations and Mediation Between ALPA and Southern, Southern Exerted Every Reasonable Effort to Make And Maintain an Agreement	... 23
(2) The Duty of a Carrier to Negotiate, Required by the Railway Labor Act, May Be Assimilated to the Correlative Duty Imposed Under the National Labor Relations Act	... 28

(3) Judged by Any Judicial or NLRB Precedent, Southern Bargained in Good Faith with ALPA and Made More Than a Reasonable Effort to Make and Maintain an Agreement	... 31
--	--------

[1991]

(4) The Carrier's Position With Respect to Rein- statement of Strikers Guilty of Misconduct, and Parking of Aircraft Did Not Constitute a Violation of Its Statutory Duty to Bargain	... 47
(A) The agreement between the Carrier and ALPA terminated by its terms prior to the strike on June 5, 1960	... 48
(B) The sole purpose of a Section 6 notice is to fix a procedure for the commencement of conferences between representatives of the parties if changes are to be made in the contract	... 53
(C) The Carrier's insistence on so-called "super seniority" for replacement pilots was a proper demand judged by judicial precedent	... 58
(D) The Carrier's proposal that it reserve the right to take appropriate disciplinary action including ineligibility to return to work, in the case of strikers who engaged in misconduct, was reasonable, necessary and, under the law, permissible	... 63
(E) The request of the Carrier that any agree- ment finally executed provide for pilots' parking and moving aircraft was a legiti- mate bargaining technique, and did not constitute "bad faith" bargaining	... 72
CONCLUSION	... 75
CERTIFICATE OF SERVICE	... 76

* * * * *

[2072]

77

[2071]

[Rec'd Mar. 17, 1961 -CAB]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

In the Matter of Compliance with :
Title IV, Section 401 (f) and 401 (k) :
of the Federal Aviation Act of 1958 by : Docket No. 11654
: :
SOUTHERN AIRWAYS, INC. :
: :

BRIEF
OF
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
TO HEARING EXAMINER WILLIAM F. CUSICK

Henry Weiss
50 E. 42nd Street
New York 17, N. Y.

Edward J. Hickey, Jr.
James L. Highsaw, Jr.
620 Tower Building
Washington 5, D. C.

Attorneys for the Air Line
Pilots Association, International

Of Counsel

MULHOLLAND, ROBIE & HICKEY
620 Tower Building
Washington 5, D. C.

March 17, 1961

[2072]

TABLE OF CONTENTS

	<u>Page</u>
Statement of the Case	1
Questions Presented	3
Argument:	
I. The Board has Jurisdiction to Entertain the Complaint on its Merits	4

A.	The Board has Determined it has Jurisdiction to Pass Upon Violations of the Railway Labor Act by Air Carriers in Connection with the Enforcement of the Federal Aviation Act	5
B.	The National Mediation Board has no Jurisdiction to Determine the Issues Raised by ALPA's Complaint.....	9
	1. Jurisdiction of National Mediation Board with Respect to Mediation Cases	10
	2. Jurisdiction of the National Mediation Board with Respect to Representation Cases	13
	3. Jurisdiction of the National Mediation Board in Interpretation Questions	15
C.	Neither the National Railroad Adjustment Board, the National Air Transport Adjustment Board, or the Southern System Board Have Jurisdiction over the Subject-Matter of ALPA's Complaint.....	16
	1. The National Railroad Adjustment Board has no Jurisdiction over Air Transport Problems .	16
	2. The National Air Transport Adjustment Board Has no Jurisdiction over the Subject-Matter of ALPA's Complaint because There is no Such Board	16
	3. Jurisdiction of Southern-ALPA System Board of Adjustment	17
II.	Southern Is In Violation of the Railway Labor Act and Consequently of the Federal Aviation Act and the Terms and Conditions of its Certificates in Its Dispute with ALPA ..	18
A.	Southern is Making Demands, as a Condition for the Ending of the Strike, that Violate Section 2, Seventh and Section 6 of the Railway Labor Act.	18
	1. Section 2, Seventh and Section 6 of the Railway Labor Act Permit Changes by Carriers in the Provisions of Collective Bargaining Agreements only by Means of a Specific Notice of Such Intended Change and Exhaustion of the Procedures of the Statute	22
	2. The Conditions Imposed upon a Settlement by Southern Involved Changes in the Rules and Working Conditions of Pilots as a Class Embodied in the ALPA-Southern Agreement	25
	3. The Conditions Imposed by Southern upon the Settlement of the Dispute were not the Subject of a Section 6 Notice	27

B. Southern's Insistence upon Changing the Seniority Rights of Striking Pilots, as a Condition to Settle the Dispute, Violated the Railway Labor Act by Insisting upon a Condition to which ALPA Cannot Legally Agree under that Statute	34
C. Southern's Insistence upon the Loss of Seniority by its Striking Pilots was Founded upon a Legally Erroneous Assumption and as such Constitutes a Violation of the Good Faith Bargaining Requirements of the Railway Labor Act	35

[2073]

Table of Contents (continued)

	<u>Page</u>
D. Southern's Condition Concerning the Disciplining of Pilots Violated Section 204 of the Railway Labor Act and Constituted Bad Faith Bargaining	37
1. Violation of Section 204	37
2. Good Faith of Proposal	38
E. Southern's Whole Course of Conduct Violates Statutory Requirements	39
Conclusion	48

* * * * *

[2124]

[Rec'd Mar. 17, 1961 -CAB]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

* * * * * * * * * * * * * * *
In the Matter of Compliance with *
Section 401(f) and Section 401 (k) *
of the Federal Aviation Act of 1958 by * Docket No. 11654

SOUTHERN AIRWAYS, INC. *

* * * * * * * * * * * * * * *

BRIEF TO EXAMINER

Robert C. Downes
Enforcement Attorney

March 17, 1961

[2125]

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
STATEMENT OF FACTS	2
ISSUES	11
ARGUMENT	12
I. The Board has Jurisdiction to Investigate, Hear, and Determine Violations of the Railway Labor Act, as amended	12
A. Statutory Provisions Involved	12
B. Language of the Federal Aviation Act of 1958	15
C. Legislative History of Section 401(k)(4) of the Federal Aviation Act of 1958, formerly Section 401(1)(4) of the Civil Aeronautics Act	19
D. Arguments of Carrier	27
II. The Carrier and ALPA are required by law to bargain in good faith	28
III. The Carrier's Conduct from Inception of Negotiations Until the June 5, 1960, Strike Evidences Good Faith Bargaining	30
IV. The Carrier's conduct from the Strike on June 5, 1960 through July 28, 1960, evidences Good Faith Bargaining	33
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	40
CONCLUSION	41

* * * * *

[2168]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

AIR LINE PILOTS ASSOCIATION v. SOUTHERN AIRWAYS, INC.
ENFORCEMENT PROCEEDING
DOCKET 11654

In the matter of compliance with Title IV, Section 401(f) and 401(k) of the
Federal Aviation Act of 1958, as amended.

INITIAL DECISION OF EXAMINER WILLIAM F. CUSICK

Served: SEP 22 1961

Upon:

Cecil A. Beasley, Jr., (Kilpatrick, Ballard & Beasley), 912 American Security Building, Washington 5, D.C., for Southern Airways, Inc.

James L. Highsaw, Jr., (Mulholland, Robie & Hickey) 620 Tower Building, Washington 5, D.C., for the Air Line Pilots Association, International.

Robert C. Downes, Civil Aeronautics Board, Washington 25, D.C., for the Bureau of Enforcement.

Exceptions to this decision may be filed within 10 days after the date of service. If exceptions are filed, briefs may be filed within a further period of 20 days. If no exceptions are filed, the decision shall become the decision of the Board 20 days after expiration of the time for filing exceptions unless the Board, within said 20-day period, makes an order constituting its final disposition of the proceeding or providing for further review.

[2169]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

AIR LINE PILOTS ASSOCIATION v. SOUTHERN AIRWAYS, INC.
ENFORCEMENT PROCEEDING
DOCKET 11654

Found that:

1. The Civil Aeronautics Board has the statutory authority to take jurisdiction and make a determination of the issues raised by the pleadings in this case.
2. Southern Airways, Inc., bargained in good faith with the Air Line Pilots Association with the intention of reaching an amended labor agreement and acted in compliance with Section 2, First, Title I, of the Railway Labor Act, as amended.
3. Southern Airways, Inc., has not violated and is not now in violation of Section 401(k)(4) of the Federal Aviation Act, which requires air carriers to comply with the provisions of Title II of the Railway Labor Act, as amended.
4. The evidence of record fails to sustain the allegations set forth in the complaint and the complaint will be dismissed.

* * * * *

[2246]

In connection with the question of taking disciplinary action against pilots found guilty of misconduct during the strike, ALPA argues that Southern's insistence on this right, as a condition to an agreement, constituted a violation of Section 204 of the Railway Labor Act. The latter

section provides for an establishment for a System Adjustment Board for the resolution of discipline and grievance cases. The attempt by Southern to bypass such a Board, which had been

[2247]

established, is in ALPA's view a demonstration of bad faith bargaining.^{53/}

In the first place it must be and it is found that reasonable grounds existed upon which to predicate a showing that various overt acts had occurred after the strike commenced which acts, if subsequently found to be as alleged, involved violence, or threats of violence, against the company's personnel, property, and operations that could not be condoned. This fact is conclusively established, not only by the testimony of various witnesses--which it is not necessary to recite in detail--but also from proceedings leading to the issuance of restraining orders against ALPA by the Chancery Court of Shelby County, Tennessee, on July 6, 1960, and by the Superior Court of Fulton County, Georgia, July 21, 1960. Copies of the above orders were introduced in evidence and constitute a part of the record in this case.

With respect to this evidence, ALPA, during the course of the hearing, objected to the receipt thereof on the grounds that it was: (1) not relevant; (2) that because certain of the evidence was not pinpointed as to time, place, date, and name of the person or persons accused, it was hearsay; and (3) where

^{53/} On brief ALPA argues: "It also smacks strongly of a deliberate desire to torpedo agreement."

[2248]

the evidence did not involve a general officer of ALPA it was also hearsay since ALPA could not be held responsible.

A ruling on the above objections was reserved until the initial

decision. Upon review, it is found that the question of alleged misconduct by pilots during the strike is clearly relevant to the issues. One of the principal stumbling blocks to final agreement revolved around the justification by Southern--whether it was bargaining in good faith--to insist on the condition in question. As to the admissibility of that portion of the evidence which was not subject to the degree of preciseness for which ALPA argues and to its contention that ALPA cannot be held responsible where it is not shown that a general officer of the association was involved, the objections are also overruled.

In Drivers Union v. Meadowmoor Co., 312 U.S. 287 (1941), the Supreme Court sustained the legality of a State court injunction prohibiting both peaceful picketing as well as acts of violence, where the record revealed that the union members were not identified as participating in all of the violent occurrences. In that case Mr. Justice Frankfurter stated:

"These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders." (Page 295)

and,

'It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondeat superior. [citations omitted]" (Page 295)

In the instant case there is ample evidence as to various specific instances involving identified striking pilots engaged in acts going far beyond those normally sanctioned in peaceful picketing.

It has been long established that an employer is not required to

reinstate striking employees guilty of unlawful conduct.^{54/} And the same holds true even though a strike was actuated by unfair labor practices of the employer--which is not the situation here--in such cases the strikers are discharged because of their lawlessness and they cease to remain employees.^{55/} As stated by Mr. Chief Justice Hughes in the Fansteel case, supra:

" * in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." (Page 253)

^{54/} Labor Board v. Fansteel Corp., 306 U.S. 240.

^{55/} Id.

and,

"We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,--to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work." (Page 255)

While the Fansteel case involved an interpretation of the Labor Management Relations Act, the principles there set forth with respect to misconduct by employees on strike are equally applicable in the instant case.^{56/}

ALPA's argument that Southern contravened the System Adjustment Board by requesting the right to a free hand on the question of disciplining

strikers guilty of misconduct, is without substance. It is true that under the old agreement provision was made for a System Adjustment Board to hear and to determine grievances and issues relating to the application and interpretation of contracts. But the matters complained of by Southern here and upon which the carrier predicates its condition to entering into an agreement with ALPA, i.e., misconduct arising out of alleged vandalism and assault, etc., are not bottomed on the application and interpretation of the old contract but are concerned solely with conditions looking toward a new work

56/ See also Wilson & Co. v. National Labor Relations Board, 120 F.2d 913, where the Seventh Circuit Court of Appeals citing the Fansteel case, held:

"It therefore appears that there is little, if any, room for argument but that petitioner was within its rights in its position that it be accorded the privilege of selecting from those guilty of violence, the ones which it would reinstate." (Page 924)

agreement. As such, the carrier was not bound to proceed through the System Adjustment Board.

Moreover, it should again be noted that ALPA itself first injected the issue of "no reprisals" as a condition to an agreement and presumably also sought to thereby eliminate the System Adjustment Board from considering any charges of misconduct involving the striking pilots. There is, of course, no way of ascertaining whether Southern--or for that matter whether ALPA--may have, in discussions across the bargaining table, modified the respective conditions each sought. Such discussions were foreclosed when ALPA, as in the case of the "seniority" question, once more simply refused to discuss the question.

Under the circumstances shown in the foregoing, it is found that Southern's demand that it be given the right to take disciplinary action against pilots found guilty of misconduct during the strike, particularly

in the face of the union's demand that there be no reprisal against any striking pilots irrespective of such charges, does not constitute bad faith bargaining nor does it serve as an indication that the carrier was bent upon not reaching an agreement with its pilot employees.

* * * * *

[2254]

SUMMARY OF FINDINGS AND CONCLUSIONS

In view of the foregoing and on the basis of all of the evidence and facts of record it is found and concluded as follows:

(1) That, pursuant to the powers vested in it by the Federal Aviation Act of 1958, as amended, the Civil Aeronautics Board has jurisdiction and is empowered to take such action as may be required by the issues raised by the pleadings in this proceeding;

(2) That Southern Airways, Inc., is a Delaware corporation with its principal office in Atlanta, Georgia, and is engaged in interstate commerce in the transportation of persons, property, and mail by air pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board;

(3) That Air Line Pilots Association is an unincorporated labor organization duly designated and authorized by the National Mediation Board, under the Railway Labor Act, as amended, to act as the collective bargaining representative of the pilot employees of Southern Airways, Inc.;

(4) That in accord with the provisions of a labor contract between the above-named parties, which became effective July 1, 1958, the Air Line Pilots Association notified Southern Airways, Inc., on July 30, 1959, of its intention to seek changes and modifications of said contract;

[2255]

(5) That subsequent negotiations between the said parties, including negotiations conducted with the aid of the National Mediation Board, terminated with the parties unable to reach an agreement on proposed changes looking toward the execution of a new labor contract;

(6) That all of the processes available under the National Mediation Board procedures have been exhausted;

(7) That pilot members of the Air Line Pilots Association withdrew from the service of Southern Airways, Inc., on June 5, 1960, which circumstance continued up to the time the record in this proceeding was closed;

(8) That Southern Airways, Inc., has continued the operations authorized under its certificate with replacement pilots hired on or about the date the strike occurred and thereafter;

(9) That Southern Airways, Inc., during bargaining sessions with the Air Line Pilots Association from September 22, 1959, through July 28, 1960, entered into negotiations with the intention of reaching an agreement and did bargain in good faith in compliance with Section 2, First, Title I, of the Railway Labor Act, as amended;

(10) That the evidence fails to show that Southern Airways, Inc., has violated or is now in violation of Section 401(k)(4) of the Federal Aviation Act of 1958, as amended, which requires

[2256]

compliance by air carriers with the provisions of Title II of the Railway Labor Act, as amended;

(11) That the evidence submitted herein fails to support the allegations set forth in the complaint, and the complaint should be and it is hereby dismissed.

* * * * *

[2261]

89

[2261]

[Rec'd Oct. 9, 1961 - CAB]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

In the Matter of Compliance with Title IV,
Section 401 (f) and 401 (k) of the Federal
Aviation Act of 1958 by : Docket No. 11654
SOUTHERN AIRWAYS, INC. :

EXCEPTIONS OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
TO INITIAL DECISION OF EXAMINER WILLIAM F. CUSICK

Henry Weiss
50 East 42nd Street
New York 17, New York

Edward J. Hickey, Jr.
James L. Highsaw, Jr.
620 Tower Building
Washington 5, D. C.

Attorneys for the Air Line Pilots
Association, International

Of Counsel:

MULHOLLAND, ROBIE & HICKEY
620 Tower Building
Washington 5, D. C.

Due Date: October 9, 1961

[2262]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

In the Matter of Compliance with Title IV, :
Section 401(f) and 401(k) of the Federal :
Aviation Act of 1958 by : Docket No. 11654
: :
SOUTHERN AIRWAYS, INC. : :

**INDEX TO EXCEPTIONS
OF AIR LINE PILOTS ASSOCIATION**

	<u>Page</u>
A. General exceptions to discussion of the evidence and conclusions of the Initial Decision (pp. 23-83) ALPA Exceptions I - V	1 - 6
B. Specific exceptions of ALPA to portion of Initial Decision entitled "The Evidence" (pp. 23-48) ALPA Exceptions VI-1 through VI-42	7 - 24
C. Specific exceptions to conclusions of Initial Decision (pp. 48-83) ALPA Exceptions VII-1 through VII-31	24 - 35
D. General exceptions with respect to omissions from Initial Decision ALPA Exceptions VIII - XVIII	35 - 37
E. Statutory References:	
Federal Aviation Act, § 401(e), 401(k)(4)	2-6, 35, 37
Railway Labor Act, § 2, 6, 204	2,3,7,8,35,36
National Labor Relations Act	2-6, 24, 32

* * * * *

[2315]

91

[2314]

[Rec'd Nov. 9, 1961-CAB]

CIVIL AERONAUTICS BOARD
[Seal] WASHINGTON 25, D.C.

* * *

October 27, 1961

Civil Aeronautics Board
Washington 25, D. C.

Gentlemen:

Re: In the Matter of Compliance with Section 401(f)
and Section 401(k) of the Federal Aviation Act
of 1958 by SOUTHERN AIRWAYS, INC. Enforce-
ment Proceeding, Docket 11654

The Bureau of Enforcement does not elect to file a separate
brief to the Board in the above entitled proceeding, but will rely
upon Enforcement Attorney's Brief to Examiner Cusick, dated
March 17, 1961.

This letter has been submitted in accordance with Part 302.31
of the Board's Rules of Practice and has been served upon all parties
to this proceeding.

Very truly yours,

/s/ John B. Drury
Enforcement Attorney

cc: Henry Weiss, Esq.
50 East 42nd Street
New York 17, N.Y.

James L. Highsaw, Jr.
Mulholland, Robie & Hickey
620 Tower Building
Washington 5, D.C.

H. B. Wigderson, Esq.
Air Line Pilots Association
55th Street and Cicero Avenue
Chicago 38, Illinois

[2315]

Cecil A. Beasley, Jr., Esq.
912 American Security Building
Washington 5, D. C.

Erle Phillips, Esq.
1410 Rhodes-Haverty Building
Atlanta 3, Georgia

[2316]

92

[2316]

[Rec'd Nov. 15, 1961-CAB]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

In the Matter of Compliance with
Title IV, Section 401(f) and 401(k)
of the Federal Aviation Act of 1958
by

Docket No. 11654

SOUTHERN AIRWAYS, INC.

BRIEF OF
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
TO CIVIL AERONAUTICS BOARD IN SUPPORT OF
EXCEPTIONS TO INITIAL DECISION

Henry Weiss
50 East 42nd Street
New York 17, New York

Edward J. Hickey, Jr.
James L. Highsaw, Jr.
620 Tower Building
Washington 5, D. C.

Attorneys for Air Line Pilots
Association, International

Of Counsel:

MULHOLLAND, ROBIE & HICKEY
620 Tower Building
Washington 5, D. C.

Due Date: November 15, 1961

[2317]

I N D E X

	<u>Page</u>
The Issues	3
Argument:	
I. Southern Violated Sections 2, First, 2, Seventh, Section 5 and Section 6 of the Railway Labor Act by Failing to Give Required Notice of Intended Changes in the Rules and Working Conditions Applicable to Pilot Employees and by Failing to Comply With the Mandatory Procedures of the Railway Labor Act Which Are a Condition Precedent to Effecting Such Changes	5
A. Section 2, Seventh, and Sections 5 and 6 of the Railway Labor Act permit changes by carriers in the provisions of collective bargaining agreements only by means of a specific notice of such intended change and exhaustion of the procedures of the statute. The Act also requires the maintenance of the status quo until the statutory procedures are exhausted.	9
B. Southern did not comply with the mandatory provisions of the statute with respect to the job and seniority rights of its pilot employees, the rights of its pilot employees to review disciplinary action against them under the statutory and contractual grievance and System Board of Adjustment machinery, and the duties of its pilot employees with respect to the parking and moving of aircraft	15
C. Southern's failure to comply with the mandatory provisions of the Railway Labor Act with respect to its demands concerning job and seniority rights of pilots, unreviewable discipline of pilots, and parking of aircraft constituted and continues to constitute a violation of the Railway Labor Act and the carrier's obligations under the Federal Aviation Act	17
1. The collective bargaining agreement between ALPA and Southern continued in effect and was not terminated by ALPA's notice of July 30, 1959, proposing certain changes therein pursuant to Section 6 of the Railway Labor Act	18
2. Not having given the required Section 6 notice and complied with other mandatory provisions of the Railway Labor Act, the changes imposed by Southern respecting job rights, seniority, discipline and parking of aircraft were unlawful	21

<u>Index (continued)</u>	<u>Page</u>
II. Southern's Demands on Pilots' Seniority and Job Rights to Review Disciplinary Action Against Them Were Unlawful Per Se, Without Regard to Southern's Failure to Serve A Section 6 Notice and Comply With the Other Mandatory Bargaining and Mediation Procedures Under the Railway Labor Act	30
A. Southern insisted that as a condition of its entering into an agreement with ALPA agree that the striking pilots forfeit all their accrued seniority. This condition and Southern's insistence on it violated Sections 2, First, 2, Third, and 2, Fourth of the Railway Labor Act	31
B. The condition imposed by Southern for settlement of its dispute with ALPA relating to pilot job and seniority rights relative to the newly hired pilots violated Sections 2, First, 2, Third, and 2, Fourth of the Railway Labor Act	33
C. Southern's demand that as a condition for ending its dispute with ALPA the carrier be given the right to discipline striking pilots without permitting them to resort to the statutory machinery applicable to such matters constitutes a violation of Section 2, First, Section 2, Third, and Section 204 of the Railway Labor Act	41
III. Southern's Insistent on Illegal Demands Also Constituted a Violation of the Statutory Requirement That It Bargain in Good Faith	49
IV. Other Illegal Action of Southern	49
Conclusion	50

* * * * *

Furthermore, it is clear that a holding that the Railway Labor Act requires that grievances of employees be heard through the machinery set up in Section 204 culminating in a Board of Adjustment accords with the overall policy embraced by Congress when it extended the provisions of the Act to carriers by air and their employees in 1936. This policy was to assure the safety of the traveling public by affording to pilots job protection so that they would have "a clear, direct voice regarding the problems of piloting, maintenance

and inspection direct to their employer and to the regulatory agencies of the Government." The House Report recommending passage of the bill that brought air carriers and

[2366]

their employees under the coverage of the Railway Labor Act stated as follows:

"During the past year there have been many terrible accidents on the air lines resulting in considerable loss of life. The greatest step that could possibly be taken to give greater safety to the air-traveling public would be to enact proper mediation legislation. It would insure against the dangers of pilot and co-pilot fatigue. It would more than any other thing that could be done, assure against improper maintenance and inspection of equipment between flights. It will, to the greatest possible degree, assure a living wage to all air workers and prevent sweatshop conditions. It does away with company unions and their dominance and gives the pilots and all other air workers a clear, direct voice regarding the problems of piloting, maintenance and inspection direct to their employer and to the regulatory agencies of the Government. This alone is the greatest possible single contribution that could be made in the interest of safety on the air lines of our country." (H.R. Rept. No. 2243, 74th Cong., 2nd Sess., pp. 2-3 (1936)).

Clearly, without a right to challenge an employer's action in discharging a pilot through the grievance machinery established under the statute culminating in the Board of Adjustment and in the decision of a neutral, pilots would be afraid to question company disciplinary action turning on matters of pilot performance no matter what its effect on the safety of the traveling public. It is, therefore, clear that Section 204 of the Railway Labor Act requires that grievances of employees arising out of disciplinary action by their employer be subject to review in accordance with the machinery under the Act culminating in a Board of Adjustment.

* * * * *

[Rec'd Nov. 15, 1961 - CAB]

**BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.**

*
 IN THE MATTER OF COMPLIANCE WITH *
 TITLE IV, SECTION 401 (f) AND 401(k) OF *
 THE FEDERAL AVIATION ACT OF 1958 BY * DOCKET NO. 11654
 *
 SOUTHERN AIRWAYS, INC. *

**BRIEF OF SOUTHERN AIRWAYS, INC.
IN SUPPORT OF INITIAL DECISION
OF EXAMINER WILLIAM F. CUSICK**

I N D E X

	PAGE
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	1
ISSUE - Did the Hearing Examiner Err in His Findings and Conclusions As Found in the Initial Decision	2
POINT ONE	
The Hearing Examiner Correctly Interpreted the Evidence Contained in the Record and Properly Decided Each Issue	3
STATEMENT OF FACTS	3
ARGUMENT AND CITATION OF AUTHORITY.....	23
A. The Carrier Was Not Required to Serve "Section 6 Notices" Before Employing Pilots on New Terms and Conditions After the June 5th, 1960, Strike by Plaintiff	23
B. The Contract Between the Air Line Pilots Associa- tion and Southern Terminated on October 1, 1959	26
C. Judged by any Judicial or Administrative Prece- dent, Southern Bargained in Good Faith with ALPA and Made More than a Reasonable Effort to Make and Maintain an Agreement	28
D. The Carrier Made No Illegal Demands on ALPA; Factually, It is Undisputed that ALPA Raised the Issue of Seniority and Reprisal Involving Strikers	41
CONCLUSION	44
CERTIFICATE OF SERVICE	45

* * * * *

[2454]

1

Room 1027,
 Universal Building
 Washington, D.C.
 Thursday, November 30, 1961

ORAL ARGUMENT

The above-entitled matter came on for oral argument pursuant to notice, at 10:00 o'clock a.m.

* * * * *

[2556]

CIVIL AERONAUTICS BOARD
 Washington 25, D.C.

CAB 62-10
 DUDley 2-7951

FOR RELEASE:
 IMMEDIATELY
 May 25, 1962

The Civil Aeronautics Board announced today its tentative decision in the Air Line Pilots Association v. Southern Airways Enforcement Proceeding, Docket 11654. The basic issue in the case, the Board stated, was whether, in the Board's judgment, the record developed in the proceeding establishes that Southern Airways failed to exert every reasonable effort, as required by the Railway Labor Act, to make and maintain an agreement with ALPA concerning rates of pay, rules, and working conditions of the carrier's pilot employees and to settle the dispute which developed between the parties.

The strike began on June 5, 1960, and has not been settled. The parties reached an impasse in their negotiations on July 12, 1960, because of requests by ALPA and counter demands of the carrier with respect to (1) the reinstatement and seniority of strikers in relation to replacement employees, and (2) the right of the company to take disciplinary action against striking employees.

The Board concluded that the demands of Southern relating to seniority and discipline are illegal. The first entails unwarranted discrimination against the strikers and the second would deprive employees of their statutory right to submit grievances to an adjustment board. The Board stated that Southern would not be bargaining in good faith if it continues, after issuance of the Board's decision, to persist in making these two demands a condition for settlement of the strike and agreement on a new contract.

The Board stated that its decision will require Southern to resume collective bargaining with ALPA in good faith, and that the agreement reached on all important economic issues in dispute during the July 1960 meetings under the auspices of the National Mediation Board should be the basis for the resumed negotiations.

The Board stated that, under settled case law, the carrier had a right on July 12, 1960, to decline to discharge the replacement employees hired up to that time and that ALPA's request for their discharge was contributing to the prolongation of the dispute. Strikers replaced on or after July 12, 1960, however, are entitled to reinstatement, and if necessary Southern should dismiss replacement employees hired after that date to make room for them. The seniority of strikers reinstated is to be unimpaired. Southern may discipline its employees as it sees fit, but any such action would be subject to statutory grievance procedures.

The Board further stated that it would grant Southern a period of thirty (30) days after issuance of its order to achieve compliance, failing which the Board would take appropriate steps under section 401(g). Should ALPA fail to cooperate with Southern in the resumed negotiations along the lines suggested in the Board's decision, this would be taken into account.

99-100

The tentative decision of the Board above announced is concurred in by Chairman Alan S. Boyd, Vice Chairman Robert T. Murphy, and Member G. Joseph Minetti. Members Chan Gurney and Whitney Gilliland do not concur with the majority decision.

Today's announcement does not, of course, constitute the Board's final decision in the proceeding. It will be formally entered and issued at a later date.

101-200

2558

E-18560

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

DOCKET 11654

AIR LINE PILOTS ASSOCIATION V. SOUTHERN AIRWAYS, INC.
ENFORCEMENT PROCEEDING

Decided: July 5, 1962

Found that under Sections 204(a), 401(g), 401(k) and 1002(a) and (c) of the Federal Aviation Act of 1958, as amended, the Board has jurisdiction to hear and determine complaints alleging violations of Title II of the Railway Labor Act by air carriers.

Found (1) that Southern Airways, Inc. (Southern), an air carrier, at all times from inception of dispute in July 1959 up to July 12, 1960, bargained in good faith with Air Line Pilots Association, International (ALPA), as required by Railway Labor Act; (2) that on July 12, 1960, Southern and ALPA reached an impasse in their negotiations, not on economic issues but by reason of two demands imposed by Southern as a condition for settlement; (3) that Southern's demand relating to disciplinary action without review would deprive employees of their statutory right to submit grievances to an adjustment board, that Southern's demand relating to seniority entails unreasonable discrimination against the striking employees, and that continued insistence on these demands would constitute a failure by Southern to bargain in good faith with ALPA; and (4) that ALPA's contention that Southern failed to comply with certain mandatory procedures of the Railway Labor Act with respect to matters of discipline and seniority should be rejected.

Found that relief requested by complaint should be granted to the extent of (1) directing Southern within thirty days to bargain collectively in good faith with ALPA as required by Railway Labor Act; and (2) retaining jurisdiction.

Principles governing settlement of dispute set out as follows: (1) agreement on economic issues reached at July 1960 meetings under auspices of National Mediation Board to be basis for resumed negotiations; (2) replacement pilots hired prior to July 12, 1960, may be retained by Southern; (3) strikers replaced on or after July 12, 1960, to be offered reinstatement upon request; (4) seniority and other rights and privileges of striking employees are to be unimpaired; and (5) Southern may discipline employees as it sees fit, but such action shall be subject to statutory grievance procedures.

APPEARANCES:

James L. Highway, Jr. for the Air Line Pilots Association, International.

Cecil A. Beasley, Jr. and Erle Phillips for Southern Airways, Inc.

John B. Drury for the Bureau of Enforcement.

OPINION

By MINETTE, Member:

This proceeding was instituted by the Bureau of Enforcement on the basis of a complaint filed by the Air Line Pilots Association, International (ALPA), against Southern Airways, Inc. (Southern). After due notice, a public hearing was held before an Examiner of the Board. Thereafter, the Examiner issued an Initial Decision, in which he found that the Board has jurisdiction to determine the issues raised by the pleadings but that the evidence of record fails to sustain the allegations made by ALPA and that the complaint should be dismissed. ALPA filed exceptions to the Initial Decision, and both ALPA and Southern filed briefs with the Board. We have reached a conclusion different from that of the Examiner.

Attached hereto as an Appendix are those portions of the Examiner's Initial Decision with which we agree and which we adopt as our own, except as modified herein. The Examiner has set forth, and we see no need to repeat, the details of the complaint, Southern's answer and the relief requested; the statutory basis for the complaint and the Board's jurisdiction; and the narrative of the negotiations and dispute and an account of the evidence. It will be helpful, however, to restate very briefly the nature of the essential determination that must be made by the Board in this proceeding and to consider the pertinent facts and statutory standards.

The essential determination that must be made by the Board is whether, in our judgment, the record developed in this proceeding establishes that Southern has failed to exert every reasonable effort, as required by Section 2, First, of the Railway Labor Act,^{1/} to make and maintain an agreement with ALPA concerning the rates of pay, rules and working conditions of the carrier's pilot employees and to settle the dispute which developed between them—or, as stated by the Examiner, whether Southern has failed to bargain in good faith with ALPA in the period

^{1/} Section 2, First, of the Railway Labor Act, reads as follows:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

2/
under review.

The pertinent factual circumstances, reduced to their barest terms, may be stated as follows: Negotiations between Southern and ALPA on a revised collective bargaining contract began in July 1959. Failing to reach agreement, a strike began on June 5, 1960, and has continued to the present time. Through the hiring of replacement employees, Southern has restored service on its routes. Negotiations and mediation, with the assistance of the National Mediation Board, continued after the strike commenced. Final meetings under the auspices of the National Mediation Board were held on July 11-12 in Washington and on July 27-28, 1960, in Atlanta, and at these meetings the parties reached essential

3/
agreement on the economic issues. On July 12, 1960, however, the parties

-
- 2/ Related issues involve the question of whether Southern has violated other statutory sections as follows: Section 2, Second, of the Railway Labor Act, which requires that disputes be considered and decided, if possible, with all expedition in conferences; Section 2, Seventh, and Sections 5 and 6 of the Railway Labor Act, which prescribe certain mandatory procedural requirements relating to rates of pay, rules and working conditions of employees; Section 2, Third and Fourth, of the Railway Labor Act, which define employer and employee rights and provide for their protection; Section 2, Sixth, and Section 204 of the Railway Labor Act, which provide for the adjustment of minor disputes; Section 401(k) of the Federal Aviation Act, which makes it a condition of a certificate that the air carrier comply with the Railway Labor Act; and Sections 401(e), 401(l), and 404 of the Federal Aviation Act, which relate to terms and conditions of certificates and the duty of air carriers to provide services. These issues, which we regard as secondary to the major issue set forth above, are disposed of in our opinion.
- 3/ From the record it appears that the parties arrived at essential agreement on the economic issues during the July 11-12 meetings in Washington. At the July 27-28 meetings in Atlanta, Mediator Edwards rendered what he termed an "advisory arbitration award"—in other words, his recommendations for settlement of the economic issues. ALPA accepted the recommendations without qualification. Southern likewise accepted the award "in principle" but did reserve its position on two economic issues: a 24-month contract instead of 18, and a provision relating to moving and parking of aircraft. The record establishes these as minor items, however, which of themselves would not have prolonged the dispute.

reached an impasse, not on unresolved economic issues but on two requests of ALPA and two counter demands of Southern relating to seniority and discipline. The requests of ALPA, submitted to the mediator on July 11, 1960,
4/ were as follows:

- (1) "All pilots employed after June 5, 1960, will be employed in accordance with the terms of the contract in effect as of that date.
- (2) "Pilots to be returned to service without reprisal."

In effect, ALPA's first request was for reinstatement of all striking pilots and for discharge of the replacement pilots hired during the strike. The counter conditions of Southern, submitted to the mediator on July 12, 1960,
5/ were as follows:

- (1) "Strikers returning to work will take seniority list as it now is. Pilots employed and working are now on priority list and strikers would fall in behind them.
- (2) "Company reserves right to take appropriate disciplinary action, including ineligibility to return to work, in case of pilots employed and working who have engaged in misconduct—vandalism, assault, etc., during strike."

By its second counter condition, Southern was not only negatively refusing to waive its rights as an employer to discipline employees but affirmatively it was demanding that it have the right to discipline without review or resort by employees to grievance procedures.

4/ ALPA Exhibit 42, Items 14 and 15.

5/ ALPA Exhibit 43; Items 5 and 6. Southern repeated these counter demands in its letter dated July 28, 1960, responding to Mediator Edwards' "advisory arbitration award," *supra*. ALPA Exhibit 49. Items 1 and 2 thereof read as follows:

- *1. Seniority — Nearly 100 pilots have been employed since the strike began, and we require only about 40 additional pilots. We are willing to return to service as many of the strikers as our needs dictate, but their seniority will date from the date on which they return to work.
- *2. Disciplinary Action — Southern reserves the right to take disciplinary action, including ineligibility to return to service, in the case of pilots who have engaged in misconduct during the strike.*

Each party was aware that its requests were not acceptable to the other party, but the record does not show that either party has withdrawn or offered to modify its conditions for settlement of the strike.

The Railway Labor Act establishes a comprehensive statutory scheme for the government of the labor-management relations of employees and employers engaged in the rail and air transportation industries. The Railway Labor Act differs in many respects from the National Labor Relations Act, which governs labor-management relations in non-transportation industries and is administered by the National Labor Relations Board. However, the two acts are similar in their basic purpose of avoiding interruptions to interstate commerce by promoting peace and order in labor-management relations. To this end the two acts have many parallel provisions, imposing positive duties and responsibilities on employers and employees alike, and defining employer and employee rights and making provision for their protection, including rights of self-organization and association free from interference, improper influence or coercion.^{6/} A basic parallel requirement of both acts, which is of particular importance here, is that the parties conduct negotiations with each other.^{7/}

6/ The courts have recognized that the two acts are parallel in basic provisions, and thus in interpreting and enforcing provisions of one act the courts have drawn freely on case law developed under the analogous provisions of both acts. Accordingly, the Board has drawn on both sources in reaching its decision herein.

7/ Railway Labor Act, Section 2, First and Second, see footnotes 1 and 2, supra.

- 7 -

8/

and that these negotiations be conducted "in good faith." Essential to "good faith" bargaining is that the parties observe the rules governing labor-management relations established by specific statutory provisions
9/ and the courts.

The specific basis for the Board's jurisdiction in the present proceeding, which is not now challenged by any party, is Section 401(k)(4) 10/ of the Federal Aviation Act of 1958, as amended (formerly Section 401(l)(4) of the Civil Aeronautics Act of 1938), which provides that "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with Title II of the Railway Labor Act, as amended."

ALPA alleges violations of the Railway Labor Act by Southern, as detailed by the Examiner. While the exact role the Board is to play in the enforcement of obligations placed on air carriers by the Railway Labor

11/ Act is unsettled—and the legislative history of Section 401(k) is of little or no help—we agree with the Examiner's conclusion that the Board must proceed on the premise that it was the intent of Congress that the Board in appropriate cases is the forum to hear and determine complaints alleging violation of such obligations by air carriers. We find that the

8/ See pp. 28-39 of Appendix for discussion by various courts of the elements of "good faith" bargaining and for the declaration by several courts that the requirement of "good faith" bargaining is the same under both Acts.

9/ Railway Labor Act, Section 2, Third and Fourth. See footnote 2, supra.

10/ Southern initially raised a question of the Board's jurisdiction but later abandoned it. See pp. 17-18 of the Appendix.

11/ Although similar complaints have been filed with the Board, heretofore the Board has never had occasion to reach the merits of the issues involved.

12/

Board has jurisdiction over the complaint.

We shall first dispose of the allegation in the complaint that from the inception of the negotiations up to the final impasse on July 12, 1960, Southern intentionally and by design totally disregarded its statutory obligation to negotiate with ALPA in good faith. The Examiner

13/

dealt with this issue in detail and concluded that Southern, up to the point (July 12, 1960) at which the issues of seniority and discipline were introduced into the negotiations, "had bargained in good faith with the intention of reaching an agreement with its pilot employees." We find that we are in essential agreement with the Examiner's findings on this point, and that the record will not support ALPA's allegations. Our consideration of this case, therefore, begins with our finding that Southern at all times up to July 12, 1960, negotiated and bargained in good faith with ALPA, as required by the Railway Labor Act.

12/ We note that in addition to filing a complaint with the Board, ALPA also brought a civil action against Southern in the U. S. District Court at Nashville, Tennessee, on November 2, 1960, requesting injunctive relief and damages. Subsequently both parties filed motions for summary judgment. The Board has been furnished with copies of Judge Miller's Memorandum Opinion entered February 16, 1962, with his Findings of Fact and Conclusions of Law and the Judgment entered April 27, 1962, and with his further Order entered May 11, 1962. We note that the Court rejected a request by Southern that under the doctrine of primary jurisdiction the civil action be stayed pending a final decision in the Board's proceeding, the Court stating in effect that its action was separate and different from the Board's proceeding and that the final determinations of the Board on the numerous factual and legal issues before it would be neither res judicata nor a guide to the court in its findings and conclusions on the legal issues before it. By a parity of reasoning we conclude that the Board must make its own determination on the issues of its proceeding, and that it is open to the Board to draw inferences and reach conclusions which may differ from those reached by the Court.

13/ Appendix pp 32-37.

We turn next to ALPA's contention that even though ALPA, when it appeared that settlement of the dispute was near, made requests relating to disciplinary action and to the reinstatement and seniority of strikers vis-a-vis the replacement employees,^{14/} the carrier was estopped from making demands relating to these same matters for failure to have served Section 6 notices with respect to them.^{15/} It is our view that in the context of the negotiations a Section 6 notice would not have been appropriate with respect to either of these matters. Obviously, a Section 6 notice on them before the strike ever started would have been unreasonable; likewise, to expect the carrier to serve a formal Section 6 notice on these matters during the final stages of negotiations to settle the strike, at which time it was necessary for the parties to discuss and reach agreement on the manner and conditions under which the striking pilots would return to work, is equally unreasonable. On July 12, 1960, some 40-45 replacement pilots had been employed and it was obviously necessary, or at least reasonable, to consider and attempt to reach agreement with respect to the reconciliation of the job retention and other rights of both groups.^{16/} As Judge Miller found in discussing

^{14/} ALPA Exhibit 42, footnote 3, supra.

^{15/} The reference is to Section 6 of the Railway Labor Act, which reads in pertinent part as follows: "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representative of the parties interested in such intended changes shall be agreed upon within ten days after receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, ... rates of pay, rules, or working conditions shall not be altered by the carrier until [certain procedural steps are completed]."

^{16/} The problem became more acute with each passing day during this period. By July 27-28, 1960, approximately 100 replacement pilots had been employed.

17/

a related point:

"At that stage, the purposes of the Act 'to avoid any interruption to commerce' and 'to provide for the prompt and orderly settlement of all disputes' could not possibly have been further effectuated by such formalities as service of Section 6 openers, invocation of the services of the Mediation Board, proffer by the Board of its services, notification by the Board to the parties, proffer of arbitration, etc. Such formalities could have only served to delay further any possible settlement of the dispute. The Court concludes that the steps which had been taken by the parties when the impasse was reached on July 12, 1960, constituted full compliance with the mandates and prohibitions of Sections 2, First, 2, Third, 2, Seventh, 5 and 6, of the Act."

18/

In addition, we find, as did Judge Miller, that by ALPA's introduction of these issues in its letter of July 11, 1960, ALPA waived the technical deficiency of failure to serve a Section 6 opener. The failure to serve such notices can be waived by agreement between the parties, and ALPA's contention that no "agreement" was made must be rejected in view of the fact that ALPA itself made the first demands. Accordingly, we reject ALPA's contentions that lack of a Section 6 notice precluded Southern from raising these demands or that Southern failed to comply with the other procedural provisions of the Railway Labor Act, referred to by Judge Miller, with respect to these matters.

19/

17/ Memorandum Opinion, February 16, 1962..

18/ Findings of Fact, April 27, 1962.

19/ In so holding, we do not accept Southern's position with respect to Section 6 notices, if such position is that once a Section 6 notice is served on specified issues, either side may, without the consent of the other, consolidate into the dispute at any stage a new, unopened and unrelated issue. If the issue is new and unrelated, a separate Section 6 notice, resulting in a separate dispute to be processed under the mandatory procedures of the Railway Labor Act, may well be required, in the absence of a waiver of such procedures by the other side. American Airlines v. ALPA, 169 F. Supp. 777 (1958).

In view of our disposition of ALPA's contention regarding Section 6 notices, we need not reach Southern's contention on brief to the Board that because the previous contract between Southern and ALPA had terminated by its own terms on October 1, 1959,^{20/} and the period during which the carrier was required by the mandatory procedural provisions of the Railway Labor Act to maintain the status quo had also expired,^{21/} Southern was at liberty to propose and make unilaterally such changes in the rates of pay, rules and working conditions of its pilot employees as it saw fit, so far as the mandatory procedures of the Railway Labor Act are concerned. Likewise, we need not rule on ALPA's contrary view that under the Railway Labor Act there is a continuous collective bargaining relationship between the parties who have entered into a contract which precludes unilateral changes without notice, absent a specific abrogation of the contract or circumstances not present here. We note, however, that even if we were to conclude that the contract has terminated, in our opinion the injection of a new proposal, near the end of negotiations and drastically changing prior arrangements relating to seniority, would in itself be sufficient to raise a serious question as to good faith bargaining. If by mutual consent the employees have continued working under the terms of the old contract during further negotiations, up to and after the commencement of the strike, the termination of the previous labor contract does not relieve the employer in the

^{20/} Southern Brief to Board, pp. 26-28.

^{21/} Southern Brief to Board, p. 27.

least of its statutory duty to exert every reasonable effort to settle the dispute and make a new agreement, nor does it afford the employer any freedom to discriminate against the strikers or union members in respect of any aspect of the employment relationship, N.L.R.B. v. Waterman S.S. Co., 309 U.S. 206 (1940); N.L.R.B. v. Potlatch Forests, 189 F.2d 82 (1951); Olin Mathieson Chemical Corp. v. N.L.R.B., 232 F.2d 158, (1956), aff'd. 352 U. S. 1020; 1020; N.L.R.B. v. Calif. Date Growers Ass'n, 259 F.2d 587 (1958).

Turning to the major substantive issues of this proceeding, ALPA contends that, apart from procedural deficiencies, the two demands made by Southern relating to seniority and discipline are unlawful, in the sense that they contravene specific statutory provisions governing labor-management relations; and that the legal consequences of Southern's insistence on the two stated conditions are that Southern was no longer bargaining in good faith, as required by the Railway Labor Act. Southern's position, on the other hand, is that the conditions for settlement of the dispute stated in Southern's proposal of July 12, 1960, relating to seniority and discipline, are not unlawful, and, in any event, that they were advanced as a counter proposal to ALPA's requests relating to the same matters. Southern says that at all times it has exerted every reasonable effort to make and maintain an agreement with ALPA, but that ALPA has frustrated these efforts by its bargaining methods and demands, including ALPA's demand which would require that the replacement pilots hired during the strike be discharged.

We shall first consider whether, in our opinion, the conditions relating to seniority and discipline proposed by Southern as a condition for settling the dispute are unlawful.

We conclude that the condition relating to non-reviewable disciplinary action, which we shall discuss first, is clearly illegal. Our reasons for this conclusion are as follows: Under the Railway Labor Act, issues relating essentially to the making or amendment of an agreement concerning rates of pay, rules, and working conditions are to be settled by collective bargaining (called major disputes), whereas disputes growing out of grievances or out of the interpretation or application of an existing agreement are to be referred, if not settled at a lower level, to an adjustment board (called minor disputes). Section 204 of the Railway Labor Act makes it a mandatory requirement that each air carrier and its employees establish appropriate boards of adjustment and provides that all unsettled disputes arising out of grievances or out of the interpretation or application of the existing collective bargaining agreement may be referred by either side to the adjustment board for decision. Pursuant to Section 204, a Southern Airways Pilot System Board

22/ Section 204 reads in pertinent part as follows:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions ... shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes."

of Adjustment was established in 1951, by contract separate from the collective bargaining contract. It provides in effect that if agreement cannot otherwise be reached by the adjustment board, the services of a neutral person will be utilized and that the resulting decision will be binding.

On brief to the Board, Southern contends in effect that although the employer-employee relationship between Southern and the striking pilots may not have been terminated by the strike, it was terminated by October 1960 since each of the strikers was permanently replaced by ^{23/} that time. We reject this contention on the basis of the authorities cited by Judge Miller in his Memorandum Opinion, set out in part in the ^{24/} margin below. We adopt as our own his conclusion of law on this matter, which he stated as follows:

"The strikers who have been replaced retain a status of striking employees and are entitled to the benefits of the procedures which are required to be established pursuant to Section 204 of the Railway Labor Act." ^{25/}

The discharge or discipline of a pilot by Southern for alleged misconduct during the strike would clearly give rise to a grievance which the pilot is entitled to have adjusted in accordance with the procedures established pursuant to Section 204 of the Railway Labor Act, culminating in a board of adjustment. Southern was thus in the

^{23/} Southern's Brief to Board, p. 43.

^{24/} N.L.R.B. v. Carlisle Lumber Co., 94 F.2d 138, cert. den. 304 U.S. 575; Jeffery-DeWitt Insulator Co. v. N.L.R.B., 91 F.2d 134, cert. den. 302 U.S. 731; Michaelson v. United States, 291 Fed. 940 (1923); (reversed on other grounds, 266 U.S. 42).

^{25/} Conclusions of Law, No. 19.

position of insisting that as a condition of settlement of the strike the ALPA representatives must agree to surrender an important statutory right of the individual striking employees. This attempt to deprive employees of a statutory right we believe is illegal per se. Apart from contravening Section 204, it also constitutes a form of improper coercion and an unwarranted interference with other protected rights of the employees. If granted, it would be tantamount to a reservation of right to the employer, in its unfettered discretion, to discriminate against employees for union activities, or, indeed, for any reason, regardless of individual fault.

The demands of the parties relating to job retention and seniority raise the problem of how far an employer may properly go in granting replacements hired during an economic strike preference over the strikers. It is well established that in the course of an economic strike a company may hire replacement employees needed in order to continue its business and, further, that the company need not, at the strike's end, discharge the replacements in order to reinstate returning strikers. Beyond this

26/ That Southern's purpose and intent in making its second counter condition was to reserve to itself the complete and non-reviewable right to discipline striking employees as it saw fit, without recourse by employees to grievance procedures, has been established beyond doubt. It was so understood by the negotiating parties at the time, and Southern has never denied it. Tr. 846-847. Appendix, pp. 41-43. See also, Judge Miller's Opinion, Findings of Fact and Conclusions of Law, and further Order, supra, footnote 12.

27/ Judge Miller's statement is, ". . . they [striking pilots] could not lawfully be deprived of their right to challenge, through grievance machinery and procedures contemplated by the Act, any disciplinary action taken against them by the company." Memorandum Opinion.

28/ N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U. S. 333 (1938). Thus an employee who engages in a strike must take the risk of being permanently replaced.

clear prerogative of management, the controversies have normally revolved around whether employers may grant "superseniority" to replacement workers in the sense of giving them seniority over the strikers for the purpose of protecting them from being laid off prior to the strikers in the event of future lay-offs or curtailment of the labor force.

^{29/} In the Potlatch Case the Ninth Circuit held that bestowing superseniority on replacements may under some circumstances be a "benefit reasonably appropriate for an employer to bestow in attempting 'to protect and continue his business by supplying places left vacant by strikers.'" Under the rationale of this leading case, just as an employer can grant "permanent" tenure to replacements in the sense of not having to discharge them to make room for returning strikers (Mackay case, supra) so can the employer grant "permanent" tenure to replacements in the sense of protecting them against lay-offs in the event of a future curtailment of the labor force. Superseniority is obviously discriminatory. But, according to Potlatch, it is not unlawful unless it is unreasonably or unduly discriminatory. And the burden of proof appears to be on those challenging the employer's action to show that under all the particular circumstances of the case the quantum, nature and effect of the discrimination engendered by the superseniority is such as to make it unreasonably discriminatory and thus unlawful as an unfair labor practice.

^{29/} N.L.R.B. v. Potlatch Forests, 189 F.2d 82 (1951). To the same effect are the following cases: Olin Mathieson Chemical Corp. v. N.L.R.B., 232 F.2d 158 (4th Cir., 1956), affirmed 352 U.S. 1020; N.L.R.B. v. Calif. Date Growers Ass'n., 259 F.2d 587 (9th Cir., 1958); Ballas Egg Products, Inc. v. N.L.R.B., 283 F. 2d 871 (6th Cir., 1960); N.L.R.B. v. Lewin-Mathes Co., 285 F.2d 329 (7th Cir., 1960); Erie Resistor Corp. v. N.L.R.B., ___ F. 2d ___, (3d Cir., May 15, 1962); Swarca, Inc. v. N.L.R.B., ___ F.2d ___ (6th Cir., May 23, 1962). Also Judge Miller's decision in ALPA v. Southern, see footnote 12, supra.

Although the grant of superseniority is not unlawfully discriminatory per se, according to the rationale of Potlatch, it should be pointed out that, with the exception of the cases noted in the margin, the courts have found from a consideration of the circumstances that the superseniority involved was unlawful. For example, in N.L.R.B. v. Calif. Date Growers Ass'n., supra, the Ninth Circuit, after reviewing the factual circumstances, found the superseniority there involved to be unlawful. In distinguishing Potlatch the court stated: "We conclude there is substantial evidence in the record as a whole to support the Board's finding that Respondent revised its seniority list not to implement its assurances to the non-strikers but rather for the purpose of punishing employees who struck against it, and to discourage by this means further activity by those strikers or other employees in behalf of the union . . ." ^{31/} Similar considerations led to the same conclusion in the Olin Mathieson Chemical Corp. v. N.L.R.B., supra; Ballas Egg Products, Inc., v. N.L.R.B., supra; and Swarco, Inc. v. N.L.R.B., supra.

In two recent cases, the National Labor Relations Board took the position that the grant of superseniority, regardless of the circumstances or the employer's motivation, constitutes an unlawful form of discrimination

^{30/} The principal exception, of course, is Judge Miller's decision in ALPA v. Southern, which will be discussed infra. In Erie Resistor Corp. v. N.L.R.B., supra, the court did not reach a ruling on the lawfulness of the superseniority there involved for lack of a finding by the trial forum as to whether the employer's policy had been adopted solely to protect and continue the business of the employer. See also, dictum in N.L.R.B. v. Lewin-Mathes Co., supra.

^{31/} One of the factual circumstances specifically mentioned was that "At no place in the record is it indicated that Respondent found it necessary to promise the non-striking employees seniority superior to that of the strikers in order to continue its operations."

2575

extending far beyond the employer's right of replacement sanctioned
^{32/} by the Supreme Court in the Mackay case, supra. Among the reasons stated for this conclusion were the following: (1) contrary to Potlatch, the Mackay decision contemplated non-discriminatory and complete reinstatement of unplaced strikers; (2) an offer of superseniority is an unlawful offer of benefit to individual strikers to abandon the strike and return
^{33/} to work; (3) the discrimination effected by superseniority lasts indefinitely; (4) superseniority effectively divides the strikers among themselves, by a combination of threat and promise, in an improper manner; (5) superseniority renders future bargaining difficult, if not impossible, for the authorized collective bargaining representative—it divides the employees into two groups and is a continual irritant; (6) granting a preference for all time to those who did not join the strike clearly discourages strike activities and union membership; and (7) superseniority is so destructive of statutory rights and guarantees that not even a claim of necessity would justify such conduct by an employer.

Despite the cogent reasons advanced by the N.L.R.B., upon review the respective courts of appeal adhered to the principle that each case must be decided on its own particular facts. Thus, upon review of Erie

^{32/} Erie Resistor Corp., 132 N.L.R.B. No. 51, decided August 1, 1961. Followed and relied on in Swarco, Inc., 133 N.L.R.B. No. 31, decided September 26, 1961.

^{33/} In the present case there is no indication in the record that any of the striking pilots returned to work. There is also no indication that Southern's recruitment and replacement program was limited to pilots who were not on strike.

Resistor, the U. S. Court of Appeals for the Third Circuit refused to enforce the order of the N.L.R.B. absent a factual finding as to whether the motivation of the employer in adopting the superseniority policy was solely to protect and continue his business or whether it was at least in part to discourage union activities, in which latter event it would be unlawful. Similarly, upon review of Swarco, Inc., the U. S. Court of Appeals for the Sixth Circuit found that the superseniority there involved was unlawful, but its conclusion was reached on the facts of the case. The Court concluded that the conduct of the employer in urging strikers to return to work on the promise of seniority over those who remained on strike constituted discrimination which did, in fact, interfere with the employees' right to engage in protected activities. The Court held that although an employer has a right to keep his business in operation during a strike, the grant of superseniority for that purpose is nevertheless unlawful in that the natural consequence of such action is to discourage protected activities.

Turning now to the facts of this proceeding and applying the principles of Potlatch and the other court cases discussed above, we are forced to the conclusion that the demand of Southern relating to seniority entails unreasonable and unwarranted discrimination against the strikers, the effect of which is to discourage and interfere with protected employee activities. In the first place, here, as in Calif. Date Growers Ass'n., sure, the record does not show that Southern found it necessary to promise superseniority to the replacements in order to induce them to enter Southern's

^{34/} On the contrary, the record shows that Southern's witness testified that no assurances of tenure or superseniority were given to the replacement pilots. ^{35/} In these circumstances it is difficult to avoid the conclusion that insistence on superseniority constitutes an unlawful form of discrimination in that it does not serve solely to protect and continue Southern's business or to carry out assurances given to the replacement pilots, but serves instead to punish the strikers and to discourage union activities.

Secondly, whatever doubt may exist disappears upon considering the scope of the superseniority condition requested by Southern. Its demand in the present case goes far beyond vesting the replacements with superseniority only for job retention purposes. Instead, the demand would require all strikers who return to service to forfeit their previously-acquired seniority, thus reducing all of them, including those with many months and years of service with the company as well as those with lesser service, to the status of new employees, ranking behind the replacements for all seniority purposes. Thus, the provision would not only place the strikers below the replacements for job tenure purposes but for all other seniority purposes as well. Further, the provision would not only place the strikers below the replacements as a class but would reduce all the strikers in the class to the same zero level--a pilot with ten years' service with the company, for example, would be reduced to the same zero seniority as a copilot.

^{34/} See footnote 31, *supra*.

^{35/} Tr. pp. 761-764, 862-864, 919-922. On July 28, 1960, when Southern's acceptance of the "advisory arbitration award" was conditioned upon superseniority, Southern had succeeded in employing about 100 replacement pilots.

- 21 -

with only a few weeks' service.

Whereas the Court in Potlatch declined to find the limited discrimination there exercised in favor of the replacements sufficient to constitute unlawful discrimination against the strikers, here the discrimination against the strikers which the demand of Southern entails goes much further. Moreover, considering the important effect which a pilot's seniority has upon various aspects of his employment status and working conditions, the extreme nature of the Southern demand forces the conclusion that an element of punitive motive and desire to discourage union activities, as opposed to protection of Southern's legitimate business interests or any holding out to or concern for the replacements, is present.

The Board is well aware that on the issue of seniority it has reached a different conclusion from that reached by the Examiner and also Judge Miller. On this issue Judge Miller states, in part:

"ALPA further contends that Southern's insistence upon seniority for the replacement pilots was punitive and coercive and that in insisting upon seniority for the replacements Southern was not exerting 'every reasonable effort' to settle the dispute. This contention is without merit. * * *

- 36/ In the Potlatch case the replacements were provided with super-seniority only to protect them from being laid off prior to the strikers in the event of an anticipated curtailment in the labor force—the seniority of the strikers was not otherwise tampered with, and there was no element of punitive action against the strikers.
- 37/ From Memorandum Opinion entered February 16, 1962. The Examiner also relies on the Mackay, Potlatch, and Lewin-Mathes decisions for his conclusion that "Southern's position in this aspect of the case has been sanctioned by the Courts."

"The question of Southern's right to give seniority to the replacement pilots is controlled by N.L.R.B. v. Mackay Radio & Telegraph Co., N.L.R.B. v. Potlatch Forests, Inc., and N.L.R.B. v. Lewin-Mathes Company [citations omitted]. * * *

"Plaintiffs submit that the Mackay, Potlatch and Lewin-Mathes decisions have been distinguished and overturned by Olin Mathieson Chem. Corp. v. N.L.R.B. and Dallas Egg Products, Inc. v. N.L.R.B. [citations omitted]. These cases are readily distinguishable. * * *

"Southern's proposal that the striking pilots' seniority 'will date from the date on which they return to work' was not, *per se*, a failure to bargain in good faith.

"Plaintiffs point out that certain benefits, e.g., increases in salaries and vacation allowances, had accrued to the striking employees by virtue of their seniority and tenure of service. These benefits, however, derived from the contract which terminated October 1, 1959, and prior collective bargaining agreements, and they persisted during and only during the terms of the contracts. [Citing and quoting from System Federation No. 59, etc. v. Ia. & A. Ry. Co., 119 F.2d 509 (1941).] * * *

"Under different circumstances, it could reasonably be concluded that such condition was imposed to punish the strikers for exercising their lawful right to strike. See e.g., N.L.R.B. v. Robinson, *supra*, 251 F.2d 639 (6th Cir., 1958); N.L.R.B. v. Wheeling Pipe Line, Inc., 229 F.2d 391 (8th Cir., 1956); Stewart Die Casting Corp. v. N.L.R.B., 114 F.2d 849 (7th Cir., 1940). Here, however, conditions had been changed by the employment of the replacements. Under the circumstances as they then existed, the Court cannot conclude that Southern invoked the proposal as a punitive measure."

On this matter there is little we can add to what we have said above. As we have stated, we need not endorse the views expressed by the N.L.R.B. in the Erie Resistor and Swarco cases that vesting replacement employees with seniority superior to that of strikers constitutes an unlawful form of discrimination, regardless of the circumstances or the employer's motivation, because its effect is to discourage and interfere with protected activities of employees. Instead we accept the rationale of Potlatch and similar cases that under certain circumstances superseniority

may be a "benefit reasonably appropriate for an employer to bestow in attempting 'to protect and continue his business . . . !'" But we cannot find Southern's demand relating to superseniority to be warranted by the circumstances disclosed by the record in the present proceeding. We have noted that it was not necessary that Southern give, and it did not give, any assurances of superseniority to the replacement hires, and thus Southern's demand, at a time when near agreement had been reached on the economic issues and the striking pilots were ready and anxious to return to work, was not related to any assurances made to them or to Southern's economic interests in protecting and continuing its business. Further, as described above, the scope of the demand goes beyond granting superseniority to replacement employees only for job retention purposes. The nature and importance of seniority to pilots in the air transportation industry and the far-reaching effects of Southern's demand on the reinstated pilots are factors which in our judgment must be taken into consideration in evaluating Southern's demand.

Earlier in this opinion we expressed the view that even if we were to conclude that the labor contract between Southern and ALPA had terminated, this would not afford Southern any freedom to discriminate against the strikers in any aspect of the employment relationship. In administering the statutory provisions designed to prohibit unreasonable and undue discrimination against employees because of the exercise by them of protected rights, the courts have stated that these provisions outlaw discrimination in respect of all elements of the employment relationship, such as seniority, whether or not there is currently in effect a formal

38/

contract. We therefore think that whether or not the previous contract had expired is not germane to the issue of whether Southern's demands with regard to seniority were unreasonably discriminatory. Nor can we conclude that the employment of the replacements changed conditions in any manner which would affect our decision on this issue.

Having found the demands made by Southern relating to seniority and discipline to be unlawful, in our opinion, in the sense that they contravene specific statutory provisions governing labor-management relations, we consider next whether the raising of the demands by Southern must, under all the circumstances, be deemed a failure by Southern to bargain in good faith.

The Board is not aware of any case holding that the mere raising of an unlawful demand in the course of negotiations constitutes a failure to bargain in good faith. The normal process of bargaining, of course, involves demands, counter-demands, concessions, compromises, etc. Where the intent is to raise a condition or demand as a negotiating matter, then it does not seem to us that the fact that the condition or demand is unlawful is inherently evil or fatal—it does not destroy good faith bargaining. But if the proponent of the unlawful condition or demand is insistent and unyielding, even if faced with a final break-off in the negotiations because of it, then the answer is clear. The general principle is well established that insistence on a demand which is illegal as a condition of settlement of a dispute, as well as interference by an employer with the protected rights of employees, constitutes in substance

38/ "These words are not so limited as to outlaw discrimination only where there is in existence a formal contract * * *. They embrace as well, all elements of the employment relationship which in fact customarily attend employment and with respect to which discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment." N.L.R.B. v. Waterman S.S. Co., 309 U. S. 206, 218 (1940). See also, N.L.R.B. v. Potlatch Forest, 189 F.2d 82, 85; N.L.R.B. v. Calif. Date Growers Ass'n, 259 F.2d 587, 589.

a failure to bargain in good faith. Texas and N. O. R. Co. v. Ry. Clerks, 281 U. S. 548 (1930); Wilson & Co. v. N.L.R.B., 120 F.2d 913 (1941); N.L.R.B. v. Pecheur Lozenge Co., 209 F.2d 393 (1953); cert. den., 347 U. S. 953; Norfolk and Portsmouth Belt Line Ry. v. Trainmen, 248 F.2d 34 (1957); N.L.R.B. v. Borg-Warner Corp., 356 U.S. 342 (1958); Douds v. International Longshoremen's Ass'n, 241 F.2d 278 (1957); and many others.

The intent with which a demand is raised and pressed during negotiations, although difficult to assess, can only be determined from a consideration of all the circumstances. In the present case, assessing Southern's intent from the factual circumstances in which the conditions were raised and from the actions of both sides thereafter presents a difficult problem.

The approach taken by the Examiner can be stated as follows: Even if it were assumed that the company went too far in its counter demands, so did the union in persisting in a demand which would in effect require the company to discharge the replacement pilots hired during the strike. Under established law, the company had a right to keep the replacement employees hired up to that point. Thus, the union was asking Southern to give up some of its rights, and it was only natural that the company make counter-demands. In this posture there was a duty on both sides to discuss these matters and to negotiate on them. The company did try or at least stood ready to negotiate on them.^{39/} But the union representatives

^{39/} As of July 12, 1960, only about 40-45 replacements had been hired. Among the strikers were a number of co-pilots still in a probationary status. It appears that it was the company's thought that if the replacements hired to date were kept it would be only probationary pilots who would not be reinstated and that the union should be willing to consider a settlement along these lines. These thoughts were informally but not formally communicated to the union. However, as indicated above, the union gave no sign that it would retract from its request that all strikers be reinstated, and so the matter was not pursued. Tr. pp. 844, 1127-30.

would not. In the words of the Examiner, p. 41, "Whether or not the carrier in subsequent bargaining sessions might have receded from its position on superseniority and settled for something less ... cannot be ascertained. ALPA simply refused to discuss the question." And again on p. 43, with reference to discipline, "There is, of course, no way of ascertaining whether Southern—or for that matter whether ALPA—may have, in discussions across the bargaining table, modified the respective conditions each sought. Such discussions were foreclosed when ALPA ... once more simply refused to discuss the question." Under these circumstances, the Examiner concluded, responsibility for the final break-off of all negotiations cannot be attributed to the company. On the contrary, it should be attributed to the union.

A completely different approach to this case may be stated as follows: On July 12, 1960, after some eight months of negotiations and mediation, and at a point when the parties were nearing agreement on the economic issues and the striking employees were ready and anxious to return to work, Southern formally and in writing took the position that it would not settle the strike except on the two conditions previously set out. That this was not a whim of the moment is demonstrated by Southern's letter of July 28, 1960, repeating the two conditions. On July 12, 1960, all negotiations on economic issues, past, present, and future, were rendered in limbo. Up to July 12, 1960, settlement of the strike through agreement on the economic issues was possible—after July 12, 1960, settlement of the strike became impossible, absent an indication from Southern that it would withdraw or modify its demands. The union representatives in the course of several negotiating sessions made it perfectly clear to the company representatives that the union could not accede to such demands. The record does not show that the

- 27 -

company indicated any willingness to modify its demands, even when faced with a final break-off in negotiations. Instead the company is taking the position before the Board that it was within its legal rights in insisting ^{40/} on its full demands. Thus, if the demands were unlawful, as the Board has found, to this extent an intent not to bargain in good faith and responsibility for the prolongation of the strike must be attributed to the company.

In view of our responsibilities under the Federal Aviation Act, the majority of the Board is unable to accept the view advanced by the Examiner. As expressed by Judge Miller in his Memorandum Opinion entered February 16, 1962, "The hopeless impasse was reached on July 12, 1960, after some eight months of negotiation and mediation." Beyond doubt, the reaching of the "hopeless impasse" was due to the two requests of ALPA and the two counter demands of Southern relating to seniority and discipline. On the one hand, it must be recognized that the union had requested reinstatement of all striking pilots, without reprisals, which would have required the dismissal of replacement pilots hired during the strike. Under well-established principles of law, with which both sides should have been familiar, Southern had a right not to accede in full to these requests. Thus, to a large ^{41/} degree ALPA was at fault in bringing about the "hopeless impasse."

-
- 40/ Under this view of the case, the question of whether the union would have agreed to modified demands is academic--the issue before the Board is not what the union might have agreed to, but whether the company had the right to insist on its full demands.
- 41/ Judge Miller attributes the continuation of the strike to ALPA's refusal to recede from and Southern's refusal to accede to ALPA's demands. Findings of Fact, April 27, 1962, Nos. 27, 32 and 34. He finds Southern's refusal to accede to ALPA's demands to be within Southern's rights. But we think that our record equally supports a finding that the reaching of the "hopeless impasse" was caused by the two counter demands of Southern, Southern's refusal to recede from them, and ALPA's refusal to accede to them. We have found Southern's counter demands to be unlawful, and we think this weighs the scales against Southern.

2585

But despite this mitigating consideration, we are not convinced that Southern can be wholly excused from raising as counter proposals, and never receding from, two conditions which the company officials could have anticipated were not acceptable and could not be acceptable to the union--conditions which were unrelated to Southern's legitimate economic interests and which could only be punitive in intent--conditions which have never been sanctioned by any agency or court. It was open to Southern to respond to ALPA's requests by a reservation of its lawful employer rights. Instead Southern chose to assert unlawful and punitive conditions which immediately led to "a hopeless impasse." Further, Southern's contention that it raised the demands on July 12, 1960, as proposals rather than as unyielding conditions for settling the dispute are not borne out by its subsequent course of action, for even when Southern was faced with a final break-off in the negotiations the record shows no indication from Southern that it would be willing to withdraw or modify its demands.^{42/} Under these conditions, we cannot find that Southern exerted every reasonable effort to settle the dispute.

The duty and responsibility of an air carrier under the Railway Labor Act to exert every reasonable effort to make and maintain agreements with

^{42/} As stated by Judge Miller in his order entered May 11, 1962, "Furthermore, the defendant's reservation of the right to take non-reviewable disciplinary action was made in the final communication between the parties when they had every reason to believe that negotiations were at an end. Under the circumstances existing at the time, defendant's reservation of the non-reviewable right to discipline cannot be properly characterized as a 'proposal' of an appropriate issue for negotiation." Judge Miller was referring to Southern's letter of July 28, 1960, addressed to Mediator Edwards.

employees and to settle all disputes in order to avoid interruptions to commerce and to its operations is a heavy one. It does not require an air carrier to accede to unreasonable demands on the part of a union. But it does not allow an air carrier to make unreasonable and unlawful demands, although the provocation may have been severe, and then allow such demands to remain the cause of an impasse. We do not comment on whether we think that the duty of an air carrier to maintain agreements with employees is any heavier than the corresponding duty placed on employees and employee organizations to maintain agreements with air carriers--we see no reason why it should be. But we note that the Congress has seen fit to place on the Civil Aeronautics Board a responsibility with respect to compliance by air carriers with their obligations under the Railway Labor Act--a responsibility which we do not have in respect of labor unions. Thus it is the conduct of the air carrier which concerns us in the present case. Where the Board finds that an air carrier has not fully complied with its obligations under the Railway Labor Act, it is incumbent upon the Board to take appropriate action under its statutory powers in the form of an appropriate remedial order.

We need not here decide the precise extent both parties may have been in past violation of the Railway Labor Act, and we note that some of ALPA's demands clearly contributed to the impasse. On the other hand, it is clear that Southern must promptly withdraw or substantially moderate the seniority and disciplinary conditions which it has sought to impose or be held in violation of that Act and subject to suspension or revocation of its certificate. Since

section 401(g) of the Act would in any event preclude revocation at this stage and instead would require that Southern be given a reasonable opportunity to achieve obedience, we have concluded that the appropriate solution is to issue an order requiring Southern to comply with the Railway Labor Act by the prompt resumption of negotiations in good faith. Failure to do so would render the certificate of Southern subject to immediate revocation as provided in section 401(g) of the Federal Aviation Act.

The relief requested by the complaint in the present case may be summarized as follows: (1) order Southern to cease and desist from further violations; (2) order Southern to comply within a reasonable time, to be fixed by the Board, with the provisions of the Railway Labor Act which require it to bargain in good faith with ALPA in an attempt to settle the strike and agree on a new contract; (3) provide that the Board retain continued jurisdiction over this matter; and (4) provide that if Southern does not comply with the order, its authority to engage in air transportation will be suspended or revoked, pursuant to the provisions of section 401(g) of the Federal Aviation Act.

In the light of the considerations which have been mentioned above, we have concluded that our order granting relief should be limited at this time to items (2) and (3). Relief under items (1) and (4) should be withheld at this time pending further developments. And we believe that a period of thirty (30) days after issuance of this order should provide sufficient time for Southern to resume negotiations looking toward settlement of the dispute. While we shall not require that they be completed or that agreement be reached within a given period of time, we will expect that the matter be vigorously

- 31 -

pursued. We can perceive of no reason for long and involved negotiations, but in any event the parties will be free to petition the Board for such additional directives as may be required.

In connection with our order commanding obedience, it is appropriate and necessary that we provide guidance to both Southern and ALPA by delineating certain principles which must be observed by both in the settlement of the dispute. Should Southern not observe these principles we shall not consider that it has resumed bargaining with ALPA in good faith, as required by our order. Should ALPA not observe these principles, or should ALPA otherwise fail to cooperate, this will be taken into account in considering any further action by the Board in this proceeding.

We see no reason why the near agreement on economic issues reached by Southern and ALPA in the July 1960 meetings under the auspices of the National Mediation Board should not be the basis for the resumption of negotiations. More specifically, we think the basis for the settlement should be the "advisory arbitration award" of Mediator Edwards, accepted on July 28, 1960, by ALPA without qualification and by Southern with but two relatively minor reservations. With regard to the difficult problem of job retention rights of replacement pilots in relation to the returning ALPA pilots, judicial decisions dealing with these matters have established guiding principles based upon considerations which are inherently just and equitable.

Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548 (1930); N.L.R.B. v.

Jones & Laughlin, 301 U. S. 1 (1936); Jeffery-Dewitt Insulator Co. v. N.L.R.B., 91 F.2d 134 (1957); N.L.R.B. v. Remington Rand, 94 F.2d 862 (1938); Black

Diamond S. S. Corp. v. N.L.R.B., 94 F.2d 875 (1938); N.L.R.B. v. Crosby Chemicals, Inc., 188 F.2d 91 (1951); N.L.R.B. v. Pecheur Lozenge Co., *supra*; N.L.R.B. v. Giustina Bros. Lumber Co., 253 F.2d 371 (1958); The Cross Company, 127 N.L.R.B. 691 (1960); and others. Under these principles, Southern would be permitted to retain as permanent employees those replacement pilots hired prior to July 12, 1960; strikers replaced on or after July 12, 1960, would be entitled to reinstatement if they desire and do request, and if necessary Southern would be required to furlough or dismiss replacement pilots hired on or after July 12, 1960, to make room for them; and the seniority and other rights and privileges of the strikers should continue unimpaired. Further, strikers not reinstated because they were replaced prior to July 12, 1960, and replacement employees furloughed to make room for reinstated strikers should, if they request, be placed by Southern on a preferential hiring list for the filling of future vacancies in the order of their seniority. Southern would be permitted to discipline its employees as it sees fit, but any such action would be subject to statutory grievance procedures. In providing these guidelines we do not intend to preclude the parties from reaching an agreement which may differ therefrom. On the other hand, any substantial and unjustifiable deviation from these guidelines will, if persisted in, be taken into consideration in determining whether the requirement of good faith bargaining has been met.

We have fully considered the various exceptions and other contentions of the parties and, except to the extent indicated, find that they would not alter our decision herein.

Accordingly, upon the basis of the foregoing considerations and all the evidence and facts of record, the Board finds:

1. That, pursuant to the powers vested in it by Sections 204(a), 401(g), 401(k), and 1002(a) and (c) of the Federal Aviation Act of 1958, as amended, the Civil Aeronautics Board has jurisdiction to hear and determine the complaint filed by ALPA in this proceeding alleging violations of the Railway Labor Act and the Federal Aviation Act by Southern;

2. That Southern at all times from the inception of the negotiations on [redacted] new labor contract in July 1959, up to July 12, 1960, bargained in good faith with ALPA in compliance with Section 2, First, of the Railway Labor Act, as amended;

3. That on July 12, 1960, Southern and ALPA reached an impasse in their negotiations on requests by ALPA and counter demands by Southern with respect to (1) the reinstatement and seniority of the strikers in relation to the replacement employees, and (2) disciplinary action against striking employees;

4. That Southern's demand relating to job retention and seniority is unlawful because it entails unreasonable and undue discrimination against the striking employees;

5. That Southern's demand relating to non-reviewable disciplinary action is illegal per se because it would deprive employees of their statutory rights to have their grievances adjusted in accordance with procedures established pursuant to Section 204 of the Railway Labor Act and constitutes improper coercion and an unwarranted interference with protected rights of employees;

6. That the continued insistence by Southern on its aforesaid demands as a condition for settlement of the strike and agreement on a new labor contract would constitute a failure by Southern to bargain in good faith with ALPA as required by Section 2, First, of the Railway Labor Act;
7. That Southern should be ordered to comply forthwith with its obligations under the Railway Labor Act to bargain in good faith with ALPA, and compliance with such order should be achieved by Southern within a period of thirty (30) days after issuance thereof, failing which, Southern's authority to engage in air transportation would be subject to suspension or revocation pursuant to Section 401(g) of the Federal Aviation Act;
8. That Southern will not achieve compliance with such Board order unless in the settlement of the dispute and agreement on a new labor contract with ALPA it is guided by the principles set out above in our opinion;
9. That should ALPA not observe the principles set out above or otherwise not cooperate with Southern in the settlement of the dispute and agreement on a new labor contract, this be taken into account in considering any further action by the Board in this proceeding;
10. That ALPA's contention that Southern has failed to comply with certain mandatory procedures of the Railway Labor Act with respect to the matters of seniority and discipline be rejected; and
11. That the various exceptions and other contentions of the parties, except to the extent indicated above, do not require any change in our findings and conclusions reached herein.

An appropriate order will be entered.

BOYD, Chairman, and MURPHY, Vice Chairman, concurred in the above opinion. GURNER and GILLILAND, Members, filed the attached joint dissenting opinion.

MEMBERS GURNEY AND GILLILAND, DISSENTING:

On the basis of the record before us, we agree with the Examiner that the complaint should be dismissed. The factual situation, the applicable law and established judicial precedents, in our view, require a different conclusion from that reached by the majority.

The majority concede that during the many months of negotiation prior to the walkout of the pilot employees and even for some five weeks after the strike was in progress, " * * * Southern at all times up to July 12, 1960, negotiated and bargained in good faith with ALPA, as required by the Railway Labor Act."^{1/}

The record eloquently demonstrates that no other conclusion could be reached. Under the most trying of circumstances, including substantial offers in the areas of pay, working rules and working conditions, which met with little or no response from ALPA other than that the carrier had taken "a good step forward", Southern fought a rather lonely battle in its efforts to reach an agreement. Even after the service by ALPA of its first strike notice in April 1960, Southern plodded on in numerous meetings with mediators of the National Mediation Board and various union representatives, including the Executive Vice President and President of ALPA, in a vain quest to reach an agreement. It was not

^{1/} Majority Op. p. 8.

- 2 -

until July 28, 1960 (not July 12, 1960, as the majority indicate),^{2/} that ALPA gave a firm assent to a settlement of the major economic issues--which, incidentally, involved acceptance in all respects of Southern's offer first made as far back as January 26, 1960.

Under the circumstances, it is unjustified oversimplification for the majority to brush the months of fruitless effort with an accolade that the carrier had bargained up to a point in "good faith". In our view, the record falls far short of supporting a similar finding--not only up to July 12, 1960, but up to the present--with respect to ALPA's activities in this dispute.^{3/} We are not alone in this view.

^{2/} At the July 11-12, 1960, mediation meetings there would not have been an agreement even in the absence of the seniority and discipline issues. See answers of Mr. McMurray to questions of the Examiner at pp. 305 and 307 of the transcript. This point was also recognized by Judge Miller in his Memorandum Opinion, the citation of which follows immediately hereinafter.

^{3/} We note and express our agreement with the following Findings of Fact and Conclusions of Law of Judge Miller entered April 27, 1962, in the U. S. District Court at Nashville, Tennessee, in a suit involving similar issues. (ALPA v. Southern, Civil Action 2982)

Findings of Fact

"32. The cause of the continuation of the strike from and after July 28, 1960, was the refusal of plaintiff Association to recede from its demands first made in its proposal of July 11, 1960. * * * (2) That no disciplinary action be taken against pilots who had engaged in misconduct during the strike. * * *"

"34. The cause of failure of the parties to settle the dispute and reach an agreement was, and continues to be, the refusal of plaintiff Association to agree to any contract which would not effectuate the discharge of the replacement pilots and the reinstatement of the striking pilots with full seniority."

Footnote continued

Although Judge Miller in the case cited found against Southern as to discipline of strikers who had engaged in misconduct, we believe, as we shall show, that Southern was justified in this counterproposal.

In bringing this case before the Board, ALPA's allegations against Southern were many and varied. The majority have seen fit to adopt the Examiner's findings on all issues except those relating to whether Southern bargained in good faith when it submitted counterproposals to demands injected by ALPA after it appeared there might be a possibility of settling at least the major economic issues. These items, submitted by ALPA not

3/ Footnote continued:

Conclusions of Law

"6. The rejection by defendant of plaintiff Association's demands with respect to seniority of the striking pilots and reinstatement of all strikers, including those who had engaged in acts of misconduct during the strike, without reprisal, without having served notice under Section 6 of the Railway Labor Act was not a violation of that section of the Act, since plaintiff itself raised these issues and injected the demands in its proposal of July 11, 1960."

"14. Defendant's insistence upon seniority for the replacement pilots was not a failure 'to exert every reasonable effort to make and maintain agreements * * * and to settle all disputes' as required by Section 2, First, of the Railway Labor Act.

"15. Defendant's insistence upon the striking pilots' seniority dating from the date on which they returned to work was not a violation of any duty imposed upon defendant by the Railway Labor Act."

"21. By refusing to enter into any agreement unless it effectuates the discharge of the replacements and reinstatement of the striking pilots with full seniority and without reprisal for misconduct, plaintiff Association was not making a good faith effort to settle the dispute, with the result that it is not now entitled to extraordinary injunctive relief requiring the discharge of the replacements."

by Southern on July 11, 1960, after the strike had been in progress for about five weeks were as follows:

(1) "All pilots employed after June 5, 1960, will be employed in accordance with the terms of the contract in effect as of that date.

(2) "Pilots to be returned to service without reprisal."

On the day following, i.e., July 12, 1960, ^{5/} Southern submitted the following counterproposals:

(1) "Strikers returning to work will take seniority list as it now is. Pilots employed and working are now on priority list and strikers would fall in behind them.

(2) "Company reserves right to take appropriate disciplinary action, including ineligibility to return to work, in case of pilots employed and working who have engaged in misconduct--vandalism, assault, etc., during strike."

The majority recognize the established law respecting the employer's rights in a situation of this nature. Thus, they agree that in the course of an economic strike, as was the case here, Southern had a right to hire replacement employees required to continue its business and, further, that if and when the strike terminated, Southern would be under no obligation to discharge the replacements in order to make room for returning strikers. ^{7/} Moreover, the majority, with what appears to be some degree of reluctance, also recognize that under certain circumstances replacement employees may be clothed with preferential seniority, i.e., holding a

^{4/} ALPA Exhibit 42, Items 14 and 15.

^{5/} At this time approximately 45 replacement pilots had been employed.

^{6/} ALPA Exhibit 43, Items 5 and 6.

^{7/} N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1958).

- 5 -

higher seniority rating on the employee roster. 8/ In going a step further, it may also be noted there are well-established precedents holding that an employer may discipline employees for misconduct during a strike and may refuse to reinstate striking employees guilty of unlawful conduct. 9/

A number of other cases concerned with the question of seniority are reviewed in the Examiner's initial decision, the Memorandum Opinion of Judge Miller, 10/ and are also touched upon in the majority opinion. These show that the courts have almost universally held that the issue of preferential seniority is not unlawful per se but is one that must be decided upon the facts in the particular case. For the most part the judicial decisions follow the rationale contained in the leading case the subject—Potlatch Forests, supra--except where the factual situation can be distinguished and will support a clear finding that the issue of preferential seniority has been interposed by an employer in order to punish or discourage union activities.

8/ N.L.R.B. v. Potlatch Forests, 189 F. 2d 82 (1951); N.L.R.B. v. Lewin-Mathes Company, 265 F. 2d 329 (1960).

9/ N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); Wilson and Co., Inc. v. N.L.R.B., 120 F. 2d 913 (1941); N.L.R.B. v. American Ins. Co., 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed.

We recognize that any striking pilot who is disciplined has a legal right to secure a review of such disciplinary action through the grievance machinery and procedures contemplated by Section 204 of the Railway Labor Act. On the other hand, we also recognize that the union could not expect the company to waive its legal right to discipline striking pilots guilty of misconduct.

10/ ALPA v. Southern, Civil Action 2982, U. S. District Court, Middle District of Tennessee, Nashville Division, Memorandum Op. February 16, 1962.

thus, in the Olin Mathieson Case, ^{11/} the company instituted a preferential seniority policy long after the strike was over, when the strikers were back at work and the plant was in full operation. The Fourth Circuit's finding that the company penalized the strikers was predicated upon a factual situation entirely different from that presented here. In the instant proceeding the seniority question arose while the pilots were on strike and Southern was dependent upon the replacement workers to keep the company in operation.

Similarly, in Ballas Egg Products, ^{12/} the Sixth Circuit found that the company had neither hired nor sought replacements during the strike and that the superseniority policy was adopted to favor nonstrikers who remained at work and punish those who went out on strike. Reference is also made by the majority to the recent decision of the Sixth Circuit Swarco Case. ^{13/} Here again the factual situation was entirely different from that with which we are now confronted. In Swarco, Inc., the company endeavored to entice strikers to return to work on the promise of seniority over those who remained on strike, an activity nonexistent in this case. In both Ballas Egg and Swarco, the employers were clearly prompted by wrongful motives.

^{11/} Olin Mathieson Chemical Corp. v. N.L.R.B., 232 F. 2d 158 (1956); aff'd. 352 U.S. 1020 (1957).

^{12/} Ballas Egg Products, Inc. v. N.L.R.B., 283 F. 2d 871 (1960).

^{13/} Swarco, Inc. v. N.L.R.B., No. 14753, U. S. Circuit Court of Appeals for the Sixth Circuit, decided May 23, 1962.

- 7 -

The majority also appear to think there is some parallel in the facts here and those shown in California Date Growers Ass'n.^{14/} While that case shows some similarity to Olin Mathieson, supra, it is readily distinguishable from the case before us. There the employer posted a "hiring list" radically changing the "seniority list", months after the strike had terminated. The Court pointed out that there was even evidence showing " * * * that the new policy was concealed from strikers asked to return."

On brief, and in argument before the Board, ALPA stressed in support of its position the decision of the National Labor Relations Board in Erie Resistor.^{15/} The majority also recite in detail the numerous cogent reasons advanced by the N.L.R.B.^{16/} to support its thesis in that case--as well as in the Swarco, supra--that preferential seniority is illegal per se. On review, the Third Circuit in a very recent decision found the position espoused by the N.L.R.B. to be untenable.^{17/} In concluding that the preferential seniority policy complained of in that case would not be discriminating absent an "illegal motive", the Court held:

"We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated. We are of the opinion that inherent in the right of an

^{14/} N.L.R.B. v. California Date Growers Ass'n., 259 F. 2d 587 (1958).

^{15/} Erie Resistor Corp. v. I.U.E. Local 613, 132 N.L.R.B. No. 51 (Decided August 1, 1961).

^{16/} Majority Op. pp. 16-18.

^{17/} Erie Resistor Corp. v. N.L.R.B., Case No. 13,700 (filed May 15, 1962).

employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. Whether the policy adopted by the Company in the instant case was illegally motivated we do not decide. The question is one of fact for decision by the Board." (Underscoring supplied)

By a pattern of reasoning which is not stated the majority have reached the conclusion that Southern's counterproposal to ALPA's relating to seniority. " * * * entails unreasonable and unwarranted discrimination against the strikers, the effect of which is to discourage and interfere with protected employee activities." ^{18/}

This conclusion is reached despite a clear showing that all replacement pilots were hired only after the strike began and Southern was faced with a complete shut down of its business. Moreover, the record further discloses, despite the majority's view to the contrary, that all replacement pilots were given to understand their jobs would be permanent, subject only to their ability to perform the duties required. ^{19/} It may be noted that in the Potlatch Case, *supra*, the Court held that the assurance of permanent jobs to replacement workers need not be proved. In this respect the Court stated:

"The Supreme Court in the Mackay Radio Case was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure. In this case Potlatch advocated 'strike

^{18/} Majority Op. p. 19.

^{19/} *Id.* pp. 305, 862, 920-922.

Opinion of Judge Miller where he says: ^{22/}

"Furthermore, if settlement of the strike had depended solely upon Southern's withdrawal of its demand for the non-reviewable right to discipline, ALPA, if it were in good faith, should have made this crucial fact known to Southern and to the mediators. The conclusion is inescapable that the strike was prolonged and, in fact, has never been settled because of ALPA's unwillingness to agree to a contract which would not effectuate the discharge of the newly hired pilots and the reinstatement of the striking pilots with full seniority."

The majority opinion states that assessing Southern's intent from the factual circumstances under which the conditions were raised and from the actions of both sides thereafter presents a difficult problem. We find no difficult problem. It is clear to us that in responding to ALPA's demands with exactly opposite conditions, Southern was merely framing the issues for further negotiations. Far from a purpose to make illegal demands with the intention of being insistent and unyielding on them, Southern was simply serving notice that it would decline to waive its rights in the premises.

The majority appear to feel that Southern's communication of July 28th, to Mediator Edwards evidenced an intent to be unyielding and insistent on its counterproposals. We do not so regard it and, for purposes of clarity, the letter is set out in full:

^{22/} See Footnote 10, supra.

July 28, 1960

Honorable Leverett Edwards
Member
National Mediation Board
Washington, D. C.

Dear Mr. Edwards:

On Thursday, July 28, 1960, in a joint conference with representatives of Southern Airways, Inc. and representatives of A.L.P.A., you rendered what you termed an "advisory arbitration award" designed to settle the economic issues between A.L.P.A. and Southern.

Please be advised that Southern Airways, Inc. accepts in principle your award, subject to execution of an agreement disposing of all issues between Southern and A.L.P.A., except insofar as it pertains to duration. Southern's position is that the contract should continue in effect for two years from the date of execution.

Southern's acceptance of your advisory award is made without prejudice to its position concerning the following matters:

- (1) Seniority - Nearly 100 pilots have been employed since the strike began, and we require only about 40 additional pilots. We are willing to return to service as many of the strikers as our needs dictate, but their seniority will date from the date on which they return to work.
- (2) Disciplinary Action - Southern reserves the right to take disciplinary action, including ineligibility to return to service, in the case of pilots who have engaged in misconduct during the strike.
- (3) Parking Aircraft - Any agreement finally executed would have to provide for pilots' parking and moving aircraft.

We appreciate your mediatory efforts and your patience in handling this dispute.

Sincerely,
SOUTHERN AIRWAYS, INC.
/s/ Erie Phillips
Erie Phillips
Attorney

Items (1) and (2) are not stated as "conditions" to the acceptance of the "award" and can scarcely justify an inference that the company was not prepared to waive or modify either one or both of them. As stated they are only a part of the predicate of a sentence and to understand the intendment close attention to the opening language of the sentence is required. To repeat it with emphasis supplied:

"Southern's acceptance of your advisory award is made without prejudice to its position concerning the following matters."

This is no more than calling attention to the fact that two elements of controversy which had been injected in the negotiations by the union remained undisposed of and that it was necessary to dispose of them. Far from constituting a refusal to negotiate this was an invitation to negotiate. Otherwise much different language would have been employed.

We read the words "without prejudice" simply to mean that the company by the letter did not waive its counterproposals. It did not reassert them. It merely by the letter did not waive them. Southern had already made it clear to ALPA that it stood ready to bargain about these matters, which is the exact antithesis of being insistent and unyielding. ALPA, however, simply refused to bargain. Faced with ALPA's unyielding insistence, it would have accomplished nothing for Southern to spell out in this letter in what respects it was willing to moderate its counterproposals, other than to weaken its position.

- 13 -

In the previous paragraph of the July 28th letter the following and equally significant language appears:

"* * * Southern Airways, Inc. accepts in principle your award, subject to execution of an agreement disposing of all issues between Southern and A.L.P.A., except insofar as it pertains to duration."

The language is clear. It is not an acceptance subject to the items concerning seniority and discipline or to the adoption of Southern's position with respect to these matters. This is not language of foreclosure but rather language which reaches for settlement. It looks to the desirable result, conducive to future harmony, that all items of dispute be covered in the agreement, including those unsettled issues introduced by ALPA and on which ALPA had not receded.

We find it difficult to assess the reasoning underlying the majority's decision. For example, on a single page the majority are in disagreement, not only with both of the disputants, but also with the Examiner and District Judge Miller as well. At page 27 they hold that since Southern's "demands" were unlawful, the carrier did not "* * * bargain in good faith and responsibility for the prolongation of the strike must be attributed to the company"; and immediately thereafter "* * * the majority of the Board is unable to accept the view advanced by the Examiner"; and a few lines below "Thus, to a large degree ALPA was at fault in bringing about the 'hopeless impasse'"; and in a footnote on the same page the majority refer to the fact that they also do not agree with District Judge Miller as to which of the parties caused the "hopeless impasse".

They undertake to extricate themselves by reversing the positions of the parties.. Thus, the demands first raised by ALPA become "requests" and Southern's counterproposals become unlawful "demands". On this basis the majority say " * * * we think this weighs the scales against Southern." ^{23/} The majority do not pass upon the question whether ALPA's demands were unlawful although they (1) require Southern to relinquish its right under the Mackay Case, supra, to retain replacement pilots and (2) require Southern to forego its right to bargain and negotiate with the association with respect to disciplinary action. ^{24/} Nevertheless,

23/ Majority Op. Footnote 41.

24/ The majority's finding that the company's counterproposal to reserve the right

"to take appropriate disciplinary action, including ineligibility to return to work, in case of pilots employed and working who have engaged in misconduct--vandalism, assault, etc., during strike"

is "clearly illegal" ignores the fact that there is no language proposing a waiver of the review procedures of the Railway Labor Act (Section 204). In the absence of such a waiver this counterproposal is clearly legal. There is no such waiver unless it is read into the language by construction. That would be difficult to do in view of the fact that the review procedures are founded on statute which, absent a contrary expressed intent, will itself be read into it. 12 Am. Jur. (Contracts Sec. 240) 769. It would be even more difficult if it is assumed that such a waiver would be illegal for under a common rule of construction:- where a word or words, or the contract as a whole, is susceptible of two meanings, one of which will uphold the contract or render it valid or enforceable, while the other will destroy it or render it invalid or ineffective, the former will be adopted. 17 C.J.S. (Contracts Sec. 318) 735. Moreover there is small reason to believe that such a waiver would be illegal. It would be a waiver only of the exercise of a remedy concerning events which have already transpired, i.e., "misconduct--vandalism, assault, etc., during

Footnote continued

we do not think that ALPA's demands were unlawful per se and, by the same token, we do not believe Southern's counterproposals to be unlawful per se. Both parties raised legitimate issues. ALPA regarded them as "just another part of cleaning up the problems associated with

24 Footnote continued:

"strike" and is entirely consistent with the law of waiver, settlement, and covenants not to sue. Even if such a waiver were deemed invalid, or not binding, or beyond the authority of the union to make, that would not render its making illegal. Hence there is no illegality in the counterproposal.

None of the cases cited by the majority or in the Tennessee decision points to the contrary. N.L.R.B. v. Carlisle Lumber Co., 94 F. 2d 138 (1937); Jeffrey-DeWitt Insulator Co. v. N.L.R.B., 91 F. 2d 134 (1937); and Michaelson v. United States, 291 F. 940 (1923) go to the question of whether the relationship of employer and employee is necessarily terminated by a strike. Union Pacific R. Co. v. Price, 360 U.S. 601 (1959); Trainmen v. Chicago R. & I. R. Co., 353 U.S. 30 (1957); and American Airlines, Inc. v. Air Line Pilots Ass'n., 91 F. Supp. 629 (1950) go to whether the adjustment procedures of the Railway Labor Act are the primary remedy. The majority concede that illegality alone would not be sufficient to support their decision but assert that it becomes sufficient when supplemented by insistence. Neither element is, of course, present here. Again none of the cases cited support the majority. Texas & N.O.R. Co. v. Ry. Clerks, 281 U.S. 548 (1930); N.L.R.B. v. Pecheur Lozenge Co., 209 F. 2d 393 (1953); Norfolk and Portsmouth Belt Line Ry. v. Trainmen, 248 F. 2d 34 (1957); and Douds v. International Longshoremen's Ass'n., 241 F. 2d 278 (1957) are not contract negotiation cases at all. Wilson & Co. v. N.L.R.B., 120 F. 2d 913 (1941) clearly holds that an employer " * * * was within its rights in its position that it be accorded the privilege of selecting from those guilty of violence, the ones which it would reinstate." N.L.R.B. v. Borg-Warner Corp., 356 U.S. 342 (1958) does not go to a question of illegality per se. What it does hold is that insistence on a demand which lies outside the scope of required collective bargaining (not the case here) as a condition to reaching agreement is equivalent to refusal to bargain on those subjects. Borg-Warner cites N.L.R.B. v. American Ins. Co., 343 U.S. 395 (1953) which is squarely in point. American upholds the lawfulness of a company's successful insistence on a contract provision for nonreviewable disciplinary action.

the withdrawal." ^{25/} Southern's view with respect to the matters in the two conditions it requested is best illustrated by the direct testimony of the carrier's president which is quoted as follows:

"Q. Now, in respect to the provision in the letter which has been identified as ALPA Exhibit 49, received in evidence, with respect to seniority and disciplinary action, what was the basis for the company's position on those items?

"A. Well, the company had employed the new pilots, there were nearly a hundred on the payroll at that time. They had been employed in good faith, they had maintained service for the public during this difficult period and we certainly didn't think we could kick them out under the circumstances.

"Mr. Phillips, I say as far as disciplinary action is concerned, a great many of the strikers had been involved in vandalism and lawlessness and we certainly didn't think that they should be excused from this and completely exonerated." ^{26/}

When the pilots went on strike, Southern was no doubt aware of the obstacles it would face in attempting to recruit and train an entirely new complement of pilots. The union's President, Mr. Sayen, as much as told Mr. Roise, Southern's President, that, in view of ALPA's recognized resources and dominance--not only nationally but internationally--in the field of professional pilots, he was foolish to make the attempt and that any such effort would end in the destruction of Southern as an air carrier. ^{27/}

Viewed realistically, the recruitment and employment of replacement

25/ Tr. p. 316.

26/ Tr. pp. 1082-1083.

27/ Tr. pp. 497, 1079, 1184.

workers is never an easy one in a situation of this kind. The record adequately demonstrates the indignities to which Southern's replacement pilots were subject, particularly in the early weeks of the

strike. ^{28/} To counter the unpleasant and sometimes hazardous conditions in which replacement workers frequently find themselves, job security and even preferential seniority may be offered as an inducement if a company's efforts to operate its business are to even partially succeed. Otherwise, the right to hire and retain replacements, as sanctioned in the Mackay Case, supra, would become a nullity.

Replacement pilots hired by Southern after the strike took place were given to understand that, subject to proof of their qualifications, their jobs would be permanent. ^{29/} It may readily be foreseen that in the event Southern now broke faith with its replacement pilots, as demanded by ALPA and as apparently condoned by the majority, the carrier would be completely at the mercy of ALPA with regard to further hirings, or with any employee union should there come a time in the future when unreasonable demands were made upon it, with the threat of a strike lurking in the background.

It is difficult to believe that either side contemplated that they would prevail in toto with respect to the two controversial items. ALPA must have known, or should have known, of Southern's right to retain replacement pilots under the law as established in the Mackay

^{28/} Tr. pp. 693-700, 1023-1061, 1122-1130. See also Ex. SOU-B and SOU-C.

^{29/} Tr. pp. 305, 862, 920-922. The majority opinion mistakenly concludes that "no assurances of tenure" were given to the replacements. (Majority Op. p. 20)

Case, supra, and it also should have known that under settled legal precedent, Southern might well prevail in granting the replacements preferential seniority. On the other hand, Southern must have been well aware of the fact that ALPA would not countenance unreviewable disciplinary action by the company without invoking its right to proceed through the System Adjustment Board. Obviously, these became bargaining items subject to give and take in negotiating sessions. The issue was joined when ALPA made its demands and Southern submitted its counterproposals, but any compromise was foreclosed by ALPA's adamant refusal to discuss the matter unless each and every one of its pilot members was returned to work ^{30/} which, of course, would have required the firing of all replacement pilots.

The majority decline comment on whether they think the duty of an air carrier to maintain agreements with employees is any heavier than the corresponding duty placed on employees and their representatives, although they say " * * * we see no reason why it should be." ^{31/} They nevertheless reach the conclusion that this Board must bear the responsibility of investigating the carrier's actions while utterly disclaiming any responsibility to measure the concomitant activities of the association. The majority say "Thus it is the conduct of the air carrier which concerns us in the present case." ^{32/} In other words,

30/ Tr. pp. 303-304. See Footnote 20, supra. We note that Mr. Hulse, President of Southern, stated with respect to seniority that he considered this a difficult and mutual problem of both ALPA's and Southern's, but that it was not insoluble since there was an area of compromise. (Tr. pp. 1226-1227).

31/ Majority Op. p. 29.

32/ Ibid.

- 19 -

the culpability of the association is to be completely ignored while the company may be pilloried as the hapless victim. This position is contrary to the plain language of the statute. The obligations of parties subject to the Railway Labor Act are not limited to carriers, their officers and agents but these obligations are made equally applicable to the "employees". 33/

The "association" here is not an outside entity. As the alter ego of the "employees", it is part and parcel of the carrier's structure. As such, it cannot be treated as a stranger nor can its responsibilities under the Railway Labor Act be ignored. We are aware of no precedent which supports a contrary view. As the duly designated representative of the pilot "employees", ALPA's obligation to "exert every reasonable effort to make and maintain agreements" is equally as great as the carrier's. The majority choose to ignore this fact. In our opinion, the majority have examined only one side of the coin, and, if for no other reason, their decision is fatally defective.

The simple fact demonstrated by this case is that ALPA through its own unwillingness to accept a solution of its economic demands which it ultimately found to be reasonable, bargained itself onto a limb from

33/ Section 2, First, of the Railway Labor Act, reads as follows: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (Underscoring supplied).

2511

- 20 -

which there was no easy retreat. It thereupon elected to bring into play labor's ultimate economic weapon--the right to strike. When this failed and it became apparent that Southern, which had succeeded in hiring approximately 100 replacement pilots outside the association ranks, was in position to reactivate its dormant route system, ALPA then, and only then, chose to order its member pilots back to work--but only on conditions that would require the discharge of all replacement pilots and would effect the reemployment "without reprisal" of all ALPA members who had engaged in vandalism, assault, etc.

In these circumstances we cannot concur in what we regard as the unjust result reached by the majority. Not only does the decision erroneously dispose of the issues at hand but if permitted to stand will create an unfortunate precedent with collateral effect and greatly complicate the exercise of the duties of the Board in other areas of its statutory responsibilities. Its prospective impact can scarcely be measured at this time.

We would dismiss the complaint.

/s/ CHAN GURNEY

/s/ WHITNEY GILLILAND

2612

Order No. E-18560

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 5th day of July, 1962

In the matter of the

AIR LINE PILOTS ASSOCIATION
v. SOUTHERN AIRWAYS, INC.

Docket 11654

Enforcement Proceeding.

O R D E R

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED THAT:

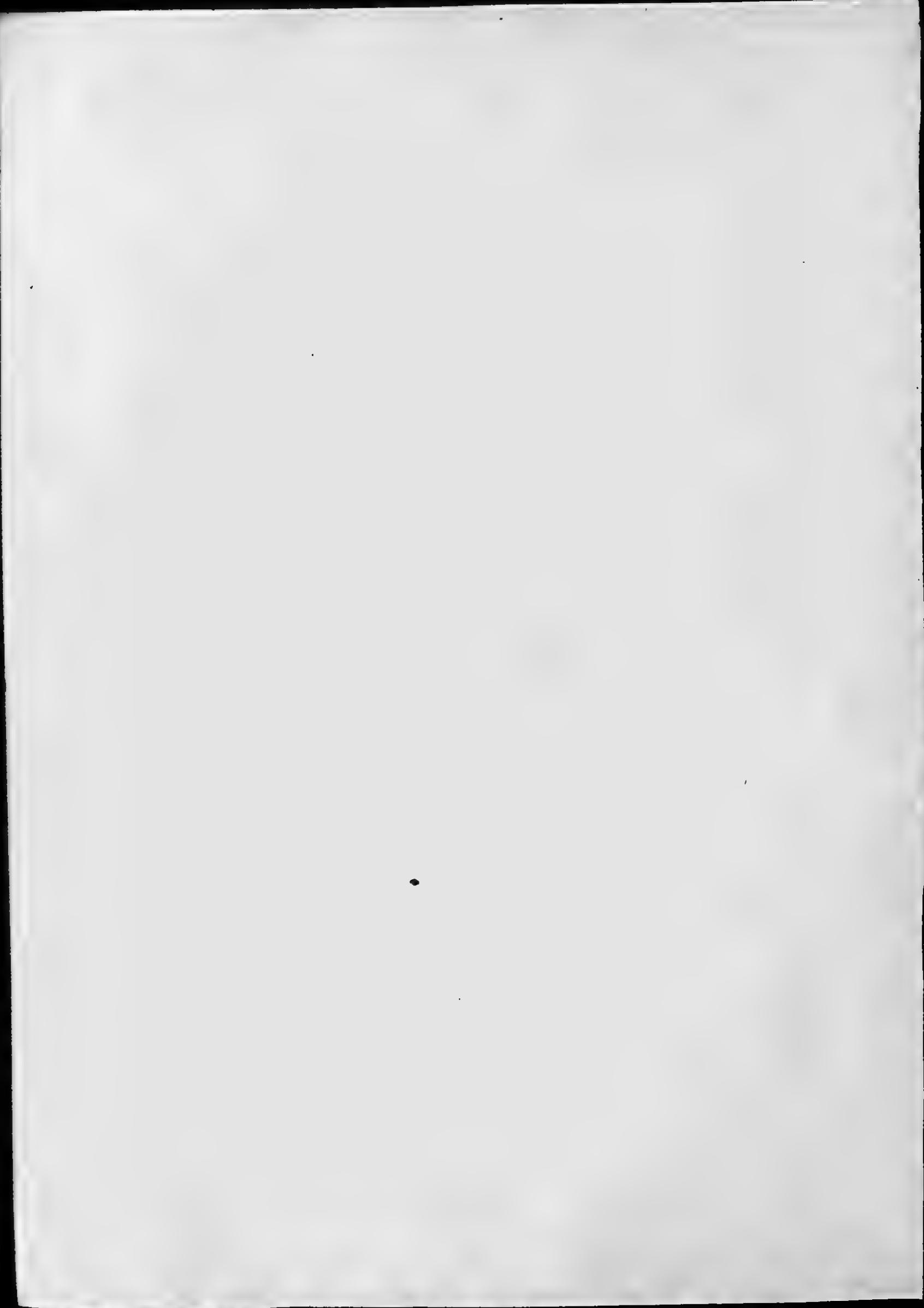
1. Southern Airways, Inc., shall within thirty (30) days after issuance of this order bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act and in accordance with the attached opinion;
2. The Board retain jurisdiction over this proceeding until further notice for the purpose of assuring compliance by Southern Airways, Inc., with this order.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON

Secretary

(SEAL)



APPENDIX

EXCERPTS FROM THE INITIAL DECISION
OF EXAMINER WILLIAM F. CUSICK IN
ALPA v. SOUTHERN, ENFORCEMENT PROCEEDING
DOCKET 11654

Preliminary Statement

This is an enforcement proceeding arising out of a petition docketed by the director of the Board's Bureau of Enforcement (the Bureau) pursuant to Rule 206 of the Rules of Practice in Economic Proceedings in which it is alleged that there are reasonable grounds to believe that certain provisions of the Federal Aviation Act of 1958, as amended, (the Act) and requirements thereunder have been violated by Southern Airways, Inc., (Southern). As a basis for its petition, the Bureau directed attention to and incorporated by reference therein, a third-party complaint filed by the Air Line Pilots Association, International (ALPA) which sets forth various alleged violations of the Act of which respondent is accused and the relief sought therefrom. Also, incorporated in the Bureau's petition is Southern's answer to the complaint and ALPA's reply thereto.

In its petition the Bureau further alleges that no offer to satisfy the complaint as authorized by 204(c) of the Rules of Practice was submitted by the carrier. The instant proceeding was accordingly instituted to determine whether any violations have been committed as alleged in the association's complaint and whether the relief requested therein should be granted. In due course a notice of hearing was issued and public hearings were held in Washington, D. C. Representatives of the Association, the carrier, and the Bureau actively participated in the hearing sessions. Thereafter, briefs were submitted by each of the parties setting forth arguments in support of their respective positions.

The Parties

Complainant association is a voluntary, unincorporated labor organization which has been duly designated and authorized by the National Mediation Board, under the Railway Labor Act, ^{1/} as amended, to act as the collective bargaining representative of the airline pilot employees in the service of respondent carrier.

Southern is a Delaware Corporation with its principal office in Atlanta, Georgia. It is engaged in interstate commerce as a common carrier by air, transporting persons, property, and mail pursuant to

1/ 45 U.S.C.A. 151 et seq.

a certificate of public convenience and necessity issued by the Civil Aeronautics Board. 2/ The carrier's operations are essentially of a local service nature and are limited geographically to the southeastern portion of the United States.

The Bureau of Enforcement is an agency of the Civil Aeronautics Board which is responsible for the development and execution of a program to obtain observance of the economic provisions of the Federal Aviation Act of 1958, as amended, and of all economic orders, regulations, and other requirements promulgated by the Board.

Basis of Dispute

The Complaint. This complaint was filed by ALPA pursuant to the provisions of Sections 204(a), 401(g), and 1002(a) of the Act. 3/ In substance, the complaint alleges that ALPA and Southern had become involved in a dispute concerning the terms and conditions of an amended collective bargaining agreement. The dispute had its beginning in July 1959 when negotiations were opened between the parties.

2/ Current certificate effective September 13, 1960. See Order E-15760.

3/ In pertinent part these sections of the Act provide:

"Sec. 204. (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this Act."

"Sec. 401. (g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: * * *."

"Sec. 1002. (a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of * * *."

It is alleged that from the inception of the negotiations Southern, intentionally and by design, disregarded its statutory obligation to negotiate in good faith so as to create a situation whereby the carrier would rid itself of any obligation to comply with the Railway Labor Act as required by its certificate, and would operate with strike-breaking pilots and other strike-breaking employees. It is further alleged that by premeditated design Southern refused any and all practical approaches to a settlement of the controversy both in negotiations and later in mediation sessions. As a direct result of the carrier's alleged failure to bargain in good faith, a strike by ALPA against Southern began on June 5, 1960, and has continued since that time.

The complaint alleges that since the beginning of the strike, Southern has provided no service or only meager service under its certificate; that the carrier's course of action is in defiance of the declared policy of the Board as set forth in Section 102(a), (b), and (c) of the Act; ^{4/} that by its actions the carrier has disregarded the statutory requirements of Section 401(e) and (l) of the Act ^{5/} and has ignored the terms, limitations, and conditions pursuant to which the

4/ Section 102(a), (b), and (c) provide:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges * * *."

5/ In pertinent part Section 401(e) and (l) provide:

"(e) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; * * *".

* * *

"(l) Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. * * *"

Board issued certificates authorizing it to engage in air transportation; and that the carrier's disregard of its statutory obligation has impaired its ability to discharge its functions as a common air carrier with respect to service to be performed and the compensation to be paid for such service, as contemplated in Sections 404(a) and 406(b) of the Act.^{6/} ALPA further alleges that Southern's relations with the various crafts and classes of employees have been marked by a continuing deterioration by reason of its alleged refusal to comply with its obligations both under the Federal Aviation Act of 1958, as amended, and the Railway Labor Act, particularly Title I, Section 2 First, of that Act.

In summation ALPA complains that Southern has violated the terms, conditions, and limitations of its certificate, the provisions of the Federal Aviation Act of 1958, as amended, and the provisions of the Railway Labor Act by its conduct with respect to the dispute with ALPA. As relief for the matters complained of, ALPA requests that the Board issue an order containing the following:

1. Directing and requiring Southern Airways, Inc., to cease and desist from the course of conduct complained of and described herein;
2. Directing Southern Airways, Inc., to comply with Sections 401(e) and 401(k)(4) of the Federal Aviation Act of 1958, and Title II and Title I, Sections 2, First, of the Railway Labor Act, within a reasonable time to be fixed by the Board;
3. Provide for intervention by the Board on a continuing basis for the purpose of assuring compliance by Southern Airways, Inc., with the foregoing requirements of the law;

6/ The pertinent part of these sections of the Act provide:

"Sec. 404. (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate * * *."

"Sec. 406. (b) In fixing and determining fair and reasonable rates of compensation * * * the Board shall take into consideration, among other factors, * * * the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and equality required for the commerce of the United States, the Postal Service, and the national defense."

4. Directing Southern Airways, Inc., forthwith to restore and resume full service and operation of the air carrier as required by the Board's certification of said carrier;
5. Providing that in the event said carrier shall refuse to comply with the Board's said order, or any part thereof, all certificates of authority to engage in air transportation which have been heretofore issued by the Board to Southern Airways, Inc., be suspended or revoked.

Answer. In answer to the complaint Southern admits that it is a common carrier by air, acting as such pursuant to a certificate of authority issued by the Civil Aeronautics Board in accordance with the provisions of the Federal Aviation Act of 1958, as amended. Southern further admits that ALPA is a voluntary, unincorporated association and that the said association has been certified by the National Mediation Board as the collective bargaining representative of pilots employed by respondent carrier. With respect to all other material facts in the complaint, Southern entered a general denial.

Southern's answer also contains a lengthy recitation of certain matters occurring from the inception of the dispute and continuing up to the time the answer was filed, which the carrier alleges demonstrates that it has exerted every reasonable effort to arrive at an agreement with ALPA and has done everything within its ability to restore and maintain its authorized services. In addition to the foregoing, Southern challenges the authority of the Civil Aeronautics Board to act in the instant matter on the ground that the Board lacks jurisdiction, expertise, and staff to resolve disputes under the Railway Labor Act.

On the basis of the above allegations and other matters contained in its answer, Southern requested that the Board dismiss the complaint without hearing and enter an order containing the following findings: 7/

1. That the Carrier's offer of January 27, 1960, was (with only minor modification) accepted by a member of the National Mediation Board in his advisory arbitration award, and by ALPA, on July 27-28, 1960;

7/ Southern's request for dismissal of the complaint without hearing was clearly premature in that it was submitted prior to the time the petition for enforcement was docketed by the Bureau of Enforcement. Rule 204(d) of the Rules of Practice provides: "Motions to dismiss a third-party complaint shall not be fileable prior to the docketing of a petition for enforcement with respect to such complaint or a portion thereof."

2. That the Carrier's continuing offer to grant substantial pay increases and improved rules and working conditions, constituted reasonable effort by the Carrier to arrive at an agreement with ALPA and was an offer made in good faith;
3. That the striking pilots of ALPA have knowingly created an atmosphere in which good faith negotiations are difficult, by reason of the threats of violence, mob demonstrations, obscene and abusive language, and destruction of property which have been directed against the Carrier's officers and employees by such striking pilots;
4. That the Carrier has made every effort to bargain in good faith with ALPA since the strike began on June 5, 1960, in spite of that atmosphere;
5. That ALPA has done all within its power to frustrate the Carrier's efforts to restore its services in interstate commerce, including intimidation of the Carrier's employees and passengers, physical interference with the work of the Carrier's working employees, and destruction and defacing of the private property of its working employees;
6. That the Carrier has made every effort to restore its interrupted services and, in spite of the interference of striking ALPA pilots, has, as of August 8, 1960, restored 35% of the mileage operated immediately prior to the strike;
7. That the captains presently working for the Carrier average nineteen years' experience and over 10,500 hours of flying time, and the services being performed by the Carrier and its working pilots are safe and have been under continuous surveillance of and approved by the Federal Aviation Agency;
8. That such temporary interruptions of the Carrier's services as have occurred during the strike against it by ALPA, were and are directly and solely within the control of ALPA, could not reasonably have been controlled by the Carrier, and therefore do not constitute "a temporary suspension of service within the meaning of [Part 205 of the Board's Economic Regulations] or of the terms, conditions or limitations of the [Carrier's] certificate";
9. That the Carrier has not violated its certificate by such interruptions of service caused by the ALPA strike, and that to find otherwise as requested by ALPA, would be to give unions nearly absolute control of all airline labor contracts, and would require this Carrier either to accept all union demands coupled with a strike threat, or to violate (and presumably to forfeit) its certificate of public convenience and necessity.

Reply. By way of reply to Southern's Answer, ALPA filed a document in which it controverts or denies, in all material particulars, those matters alleged by Southern in defense of the charges contained in the complaint. Insofar as the answer contains matters in support of affirmative allegations, the association requests proof thereof.

Issues

The relative status of Southern, as an air carrier subject to the Act and all the requirements thereunder, and of ALPA, as the duly designated collective bargaining agent for the pilot employees of Southern, is conceded.

The basic issues raised by the pleadings are twofold—one a question of law, the other a question of fact. The first issue: Does jurisdiction rest in the Board to decide a labor dispute arising out of the statutory provisions of the Railway Labor Act must, of course, be first resolved. Only in the event of an affirmative finding on the jurisdictional question does the second issue arise for consideration, i.e., did Southern disregard a statutory obligation to bargain in good faith and, if so, did it precipitate the impasse which ultimately caused a breakoff in negotiations looking toward a new or amended labor contract between ALPA and the carrier? There are, of course, other incidental matters in controversy but these are of a collateral nature and are indicative of the result rather than the cause of the dispute. As such, they are subordinate to the principal issues of jurisdiction and good faith bargaining.

Jurisdiction

At no time since the petition for enforcement was docketed by the Bureau of Enforcement, either during the hearing or subsequently on brief to the examiner, has Southern disputed the jurisdiction of the Board with respect to the matters in controversy. The only place where the Board's authority has been questioned is in Southern's answer to the complaint wherein it moved dismissal of the proceeding on the ground, among others, that:

"It is clear from a fair analysis of the law that the Board's jurisdiction under the Federal Aviation Act arises only after a proper determination has been made by the Railway Labor Act agencies that a carrier is in violation of that Act."

[7]

As noted in footnote 8, / supra, the request to dismiss was not "fileable" at the above stage of the case in that it was in contravention of Rule 204(d) of the Rules of Practice. In the absence of a renewal of the motion after the complaint was docketed by the Bureau of Enforcement, Southern's attack on the Board's jurisdiction—as a basis for the dismissal of the proceeding—would not normally be entertainable. Whether Southern's failure to refile the motion resulted from oversight or constituted an abandonment of its

2320

challenge to the Board's authority to act in the premises, is not ascertainable from the record. Nevertheless, since the question of jurisdiction is of first importance in resolving the controversy, Southern's arguments in this respect will be disposed of on the merits.

There is no question but that certain provisions of the Railway Labor Act are closely interwoven within the framework of the Federal Aviation Act. The law is explicit on this point. The various labor provisions of the Federal Aviation Act, relating to rates of compensation, maximum hours, and other working conditions and relations of pilots and copilots, are contained in Section 401(k) of that Act. Of special significance in connection with the question involved here is subsection 4 which reads as follows:

"It shall be a condition upon the holding of a certificate by any air carrier that such air carrier shall comply with Title II of the Railway Labor Act, as amended."

The above condition is attached not only to Southern's certificate but to all certificates of public convenience and necessity issued by the Board.

Sections 201 and 202 of Title II of the Railway Labor Act make applicable to air carriers all of the provisions of Title I of that Act, except those contained in Section 3 thereof. 8/ Title I of the Labor Act sets forth, inter alia, the duties of carriers and their employees to avoid interruptions of service growing out of any dispute which may arise between them. 9/

8/ Sec. 201. All of the provisions of Title I of this Act, except the provisions of Section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner or rendition of his service.

Sec. 202. The duties, requirements, penalties, benefits and privileges prescribed and established by the provisions of Title I of this Act, except Section 3 thereof, shall apply to said carriers by air, and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee," respectively, in Section 1 thereof.

9/ Title I, Section 2, First, of the Railway Labor Act makes it the duty of all carriers, their officers, agents and employees *** to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Under Section 1002(a) of the Federal Aviation Act, supra, it is the "duty" of the Board to investigate a complaint if there appears "to be any reasonable ground" for such action. If the Board finds:

"* * * after notice and hearing, in any investigation instituted upon complaint or upon their own initiative with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith." 10/

Pursuant to Section 401(g) of the Act, supra, the Board may, after notice and hearing, suspend or revoke any certificate for "intentional failure to comply with any provision of this title" or any "condition" attaching to such certificate. If revocation is in order, the Board, in accord with the statute, must also fix a reasonable time to permit compliance prior to taking the ultimate action of revocation.

Since Section 401(k)(4) of the Act requires compliance with certain stated provisions of the Railway Labor Act and since the complaint herein alleges a violation of those provisions, the duty of the Board to proceed in the instant case seems clear.

Notwithstanding the statutory directives outlined above, which reveal the Board's powers and duties where violations of the Act are alleged. Southern disputes the Board's authority to act herein. In its answer the carrier takes the position that the Board's jurisdiction "arises only after a proper determination has been made by the Railway Labor Act agencies that a carrier is in violation of that Act." This challenge to the Board's jurisdiction is apparently predicated on the so-called primary jurisdiction doctrine. By this rule of law, courts generally refuse to take jurisdiction of controversies involving complicated or technical issues where it appears that the statute contemplates the resolution of such disputes shall be made in the first instance by an administrative agency comprising a board of experts in the particular field. 11/

10/ Section 1002(c).

11/ See United States v. Radio Corporation of America, 358 U.S. 334 and the cases cited therein for a recent review of the doctrine of primary jurisdiction.

In support of its position the carrier cites the Pitney Case together with several additional precedents establishing the same principle. 12/ These decisions without doubt uphold the principle that where a factual question to be decided is intricate and technical and where an agency especially competent and specifically designated to deal with it has been created by Congress, courts should exercise their equitable discretion to give that agency the first opportunity to pass on the issue. But as pointed out infra—unlike the Pitney Case and others cited by Southern--both the carrier and ALPA have already exhausted all of the limited machinery presently available under the Labor Relations Act to settle the dispute between them. A brief review of the functions and powers of these agencies amply demonstrates the legal impediments obviating their making the findings required by the issues raised in this case.

The various duties of the National Mediation Board are set out in Section 2, Ninth, Section 5, and Section 203 of the Railway Labor Act. That Board's principal obligation is to mediate disputes concerning changes in rates of pay, rules, or working conditions and any other dispute not referable to the Adjustment Board and not settled in conferences between the parties or where conferences are refused. The Mediation Board's function is to supplement the conference procedure by mediation, but it has no power of decision in such disputes. If mediation fails, the Mediation Board is then required to endeavor to persuade the parties to submit their controversy to arbitration, but again it has no power to compel arbitration. The evidence of record, which is reviewed in some detail later herein, firmly establishes that the above services of the Mediation Board were availed of to the limit of that agency's authority.

12/ Order of Conductors v. Pitney, 326 U.S. 561; Order of R. R. Tel. v. New Orleans, Texas & Mex. Ry. Co., 156 F. (2d) 1, cert. denied 329 U.S. 758; Washington Terminal Co. v. Boswell, 124 F. (2d) 235, (aff'd. 319 U.S. 732).

Under certain circumstances, the Mediation Board is also directed to notify the President when a dispute between a carrier and its employees is not adjusted under the various provisions of the Labor Act but threatens to interrupt interstate commerce. Upon such notification the President may, in his discretion, create an Emergency Board to investigate and report respecting such dispute. This power was not exercised by the Mediation Board in the present dispute. In any event, even had such an Emergency Board been created, it would have had no equal authority to enter a binding and enforceable order.

The only instance in which the Mediation Board has definite authority to enter an enforceable order is in connection with so-called "representation disputes" where it is authorized to investigate such disputes and to certify what organization shall constitute the employees' choice of representative. The latter function is, of course, not relevant to the issues involved here. While the Mediation Board also has jurisdiction where a controversy arises over interpretation of an agreement reached through mediation, this power is equally not germane to the instant dispute.

From the foregoing it may readily be seen that the National Mediation Board has no primary jurisdiction to resolve the issues raised by the pleadings herein.

Title I of Section 3 of the Railway Labor Act establishes a National Railroad Adjustment Board. This board can entertain disputes arising out of the interpretation of an agreement and is authorized to make awards and settlement thereof. Such awards can be enforced in the District Courts of the United States. However, as noted earlier, Congress in enacting Title II respecting air carriers expressly made Section 3 of Title I inapplicable to such carriers. Instead of establishing a national board comparable in jurisdiction and authority to the National Railroad Adjustment Board, it enacted Section 2 of Title II directing the National Mediation Board to establish a National Air Transport Adjustment Board when, in the judgment of the Mediation Board, it shall be necessary to have a permanent national board of adjustment. The Mediation Board has not, to this date, directed the creation of such a board. In any event, had a National Air Transport Adjustment Board been established, its jurisdiction would be limited by the statute to the resolution of disputes involving interpretations of agreements and would not include authority to determine statutory violations such as are alleged herein. 13/

In view of the foregoing, it is abundantly clear that Southern's contention that the Board, under the primary jurisdiction doctrine, must defer

13/ cf. Cunningham v. Erie Railroad Company, 266 F. 2d 411 (1959).

to the "Railway Labor Act agencies" cannot stand the real test under that doctrine, since whatever limited authority those agencies might have in the premises has already been invoked to the fullest.

Thus, the only remedies available to a party with a grievance founded upon an alleged violation of a statutory condition in a certificate--such as is in issue here--are for judicial enforcement through a court order directing compliance or resort to the Civil Aeronautics Board for an order requiring compliance under the penalty of certificate revocation. Injunction proceedings directing compliance with the Railway Labor Act have been sanctioned by the Supreme Court. ^{14/} Moreover, the Labor Act itself makes it the duty of any United States district attorney to whom a representative of a carrier's employees may apply to institute and prosecute a proceeding for the enforcement of those duties imposed upon the carriers by Section 2 of the Act. However, the availability of these remedies would not postpone resort to the remedy contained in the Federal Aviation Act under the primary jurisdiction doctrine. Neither an equity court nor a court before which the district attorney would prosecute such an action would constitute an expert or technical body within the meaning of the doctrine of primary jurisdiction.

Moreover, even though a court proceeding were successfully prosecuted, revocation of a carrier's certificate would not become an accomplished fact. Section 401(g) of the Federal Aviation Act limits the power of the Board to revoke a certificate to situations where an intentional failure to comply with a condition has been established. The carrier would still be entitled to notice and hearing before the Civil Aeronautics Board, and the intentional failure would have to be first established. The same section of the Federal Aviation Act further provides that before the Board may direct revocation of a certificate, it must first enter an order commanding obedience to the condition violated within a reasonable time fixed by the Board. It therefore appears that the same primary jurisdiction doctrine on which Southern erroneously relies points up the fact that the Civil Aeronautics Board is the proper forum in which to first test whether one of the conditions in a certificate issued by the Board has been violated.

Indeed, the Board in a relatively recent case involving an application for approval of a certain agreement pursuant to Section 412 of the Federal Aviation Act made findings with respect to whether the said agreement was in violation of the Railway Labor Act. ^{15/} In its decision in that case the Board stated:

^{14/} Texas & New Orleans Ry. Co. v. Ry. Clerks, 281 U.S. 548; Virginia Ry. v. System Federation, 300 U.S. 515.

^{15/} Six Carrier Mutual Aid Pact, Order E-13899, (decided May 20, 1959); cf. Airlines Negotiating Conference Agreements, 8 C.A.B. 354 (1947), where the issues also revolved around an interpretation of certain provisions of the Railway Labor Act.

"Since both the Federal Aviation Act and the Railway Labor Act provide that every air carrier, and its employees, must comply with the applicable provisions of the latter statute, our measurement of the agreement against the standards contained in Section 412 begins with the inquiry whether the agreement violates the Railway Labor Act." 16/

Thereupon the Board turned its attention to whether: (a) the agreement would involve a repudiation of the requirement that the collective bargaining be in good faith; (b) the agreement violated the duties of air carriers under the Railway Labor Act; and (c) the agreement would violate the Railway Labor Act by attempting to force unions to accept Emergency Boards' recommendations. Whether or not lacking in the expertise found in the "Railway Labor Act agencies", the Board, in resolving the issues in the above cases, was nevertheless confronted with the burden of interpreting various provisions of the Railway Labor Act as are applicable to air carriers.

If the Board was clothed with jurisdiction in the above case, its legal power to proceed herein would appear to be equally well established. Here the Board is called upon to determine whether a carrier has violated a condition to the holding of a certificate granted by the Board. A prerequisite to the issuance of any certificate of public convenience and necessity is a finding that the holder thereof is fit, willing, and able to conform to the provisions of the Act and the rules, regulations, and requirements thereunder. Any challenge to the failure of a carrier to satisfactorily meet these obligations comes properly within the area of the Board's authority and, in discharging its functions and responsibilities in this respect, it makes little difference that the Board must venture into a field where its so-called expertise may be limited. Had the Congress intended to place this responsibility elsewhere, legislation would have been enacted to read accordingly.

On brief Bureau Counsel has quoted at length from the legislative history of Section 401(1)(4) of the Civil Aeronautics Act of 1938, 17/ in support of the Bureau's position that the Board has jurisdiction in the instant matter. While these citations further demonstrate that the above section was included as part of the regulatory scheme for the purpose of providing effective machinery for enforcing the provisions of the Railway Labor Act, it is unnecessary to probe into the congressional intent where the statute is plain on its face. 18/ In the instant case the statutory condition to the holding of a certificate of public convenience and necessity is direct and without equivocation.

In view of the foregoing and all other matters of record, it is found that the Board has jurisdiction to determine the issues raised by the pleadings in this proceeding.

16/ Id. pp. 3 and 4 mimeo. op.

17/ Re-enacted without change as Section 401(k)(4) in the Federal Aviation Act of 1958, as amended.

18/ ** * * there is no need to refer to the legislative history where the statutory language is clear." Ex Parte Collett 337 U.S. 55, 61.

The Evidence

As noted earlier, the dispute between these parties had its inception in 1959 when ALPA, by letter dated July 30, 1959, informed Southern that the carrier's pilots wished to make certain changes in the existing employment agreement and also desired to negotiate changes in the pilot's Retirement Plan. This procedure was in accord with Section 36 of the agreement which provided that it would become effective on July 1, 1958, and would continue in full force and effect until October 1, 1959. Thereafter, the agreement would renew itself without change until each succeeding October 1st, unless either party was served with written notice pursuant to Section 6, Title I, of the Railway Labor Act, as amended, at least 60 days prior to October 1st in any year subsequent to 1958, of intended changes in the agreement.

Accompanying the above letter was the association's proposed amendment setting out the various changes it desired to make in the basic agreement. These comprised items relating to first pilot base pay, hourly pay, mileage pay, copilot pay, minimum pay guaranteed, duty rigs, operational duty pay, the on-duty rig, pay at intermediate stops, and others. The foregoing revisions would affect not only pilots' pay but would also involve changes in rules and working conditions. For example, the amendment proposed changing the title of Section 3 of the basic agreement from "First Pilot Base Pay" to "First Pilot Longevity Pay" and revising the section to reflect ALPA's demands for hourly longevity pay at specified rates per hour for first pilots during the first year of service graduated upwards for those with 11 years of service. This, of course, is termed a pay or money proposal. Another proposal relating to an amendment of Section 11 of the agreement and providing that first pilots and copilots who hold trip bids shall be given preference over reserve pilots and nonbid holding copilots on regular schedules, extra sections, etc., is termed a "working rule." An example of a "working condition" is shown in the proposed amendment to Section 19 of the basic agreement relating to pilots' hours of service. One of ALPA's witnesses explained that the difference between a "working condition" and a "working rule" is that the former comes within the hours of service section in the pilots' employment agreement such as that involving a duty rig, while the latter is concerned with such matters as sick leave, vacation, etc.

In total, the "Section 6 opener" 19/ contained proposed revisions of 19 sections, plus a number of subsections of the basic agreement involving items relating to pay, working rules, and working conditions. The proposed revisions relating to ALPA's pay demands would result in a captain, employed as such for eight years, flying 85 hours per month, half day and half night, receiving \$1,267 per month. The latter figure compared with \$1,178 per month received by an eight-year captain under the basic agreement for similar services performed. On cross-examination of one of the

19/ In the parlance of the labor relations industry this has become the accepted term used when referring to the notice served by one party on the other outlining revisions sought in an existing collective bargaining agreement.

association's witnesses, however, it was conceded that in addition to the pay demands, every other item in ALPA's proposal involving changes in working rules and working conditions represented "a potential added cost"^{20/} to the carrier.

In order to properly evaluate one of ALPA's contentions, which is to the effect that the carrier's entire course of conduct since the beginning has been in violation of the statutory requirements, it is essential to review the various steps taken by each of the parties from the time the so-called "Section 6 opener" was served on Southern. As noted above, this document was served on July 30, 1959. At that time it was suggested that negotiations should begin on August 11, 1959, in Southern's offices in Atlanta. By letter dated August 5, 1959, Southern advised the association that a mechanics' strike against the carrier had commenced on August 1 and that it would be impossible to begin negotiations on August 11 as suggested by ALPA. The testimony of record shows that the reason for the postponement was the fact that supervisory employees of the carrier were occupied doing maintenance work formerly done by the striking mechanics. It was indicated that as soon as the strike was settled, Southern would contact the association and suggest a time and place for negotiations. The carrier did not receive any communication by telephone, mail, or otherwise from any representative of ALPA protesting the delay. As a matter of fact, the letter of July 30, 1959, from the association to the carrier specifically stated:

"If this date [August 11, 1959] is not agreeable to you,
would you nominate a date and suggest a time and place where
conferences can be held * * *."

Subsequently, by letter dated September 4, 1959, the company suggested that negotiations commence on September 21, 1959, in Atlanta at a mutually convenient place which would be arranged for by the carrier. Thereafter, the association in a letter dated September 9, 1959, requested that negotiations begin on the day following that suggested by the carrier, i.e., September 22, 1959. The latter date was finally agreed upon by both parties. In view of the evidence shown above, the contention by ALPA that Southern's failure to agree to open negotiations on the specific date fixed by the association "constituted a clear violation of the statute," is obviously without merit.

Negotiations were commenced in the Georgian Hotel in Atlanta on the morning of September 22, 1959. Committees representing both the association and the carrier were present. The morning of the first day of negotiations was taken up with an explanation by Mr. James P. Pashkov, chief spokesman for the association, of the various contract changes desired by the pilots.

2323

There is also some testimony tending to show that at this first session Mr. Pashkov is alleged to have said: "There will be no contract signed until the ACMA dispute [mechanics' strike] is settled." Two of the negotiators for the company testified that the statement was made. Mr. Pashkov denied making the statement although he did admit saying in effect that the company should reconsider its position with respect to the striking mechanics.

The question of whether or not the association took such a position might normally be an important consideration in determining whether the union itself was engaged in good faith bargaining. However, since the record shows that the matter of the mechanics' strike was mentioned only in the first day or two of negotiations; that a United States District Court Order was entered on the day before negotiations herein were commenced, i.e., September 21, 1959, holding that the mechanics' strike was "illegal;" 21/ and that for all intent and purposes the mechanics' strike had apparently been terminated, if not settled by agreement, at the time negotiations began with respect to ALPA's contract, the matter is not of a significant importance in determining the issues herein.

The negotiation committee reconvened on the morning of September 23, 1959. At this session Southern's assistant treasurer appeared and orally presented a so-called incentive plan which the company had been considering. Under this plan the block speed for aircraft would first be established and pilots would be paid, as a group, additional compensation for exceeding this basic speed. It was asserted that such a plan would result in substantially higher earnings for the pilots at no additional cost to the carrier. The association spokesman indicated that although the union favored improvement of performance, it preferred that discussion of any incentive plan be had after reaching agreement on the basic employment contract. The matter was thereafter dropped and the meeting recessed for lunch.

At the afternoon session the company made its first offer to the pilots. This was an oral proposal which included the following: 22/

1. Increase captains' pay \$25 per month;
2. Copilots increase 1% to 42-47-52%;
3. One hour reporting pay when pilot fails to fly;
4. Reserve pilot receive minimum monthly guarantee in the month when vacation is taken;
5. Company to give one month advance notice when granting a vacation;
6. Full pay for deadheading;
7. Extend sick leave to 260 hours (from 230 hours).

21/ Ex. SOU 2.

22/ ALPA made written notes of the items contained in the oral proposal which were introduced in exhibit form at the hearing. Southern admits that the exhibit is a correct summary of the offer made by the company to ALPA.

Items 3 through 7 were among those demanded by ALPA in its "opener." All of the items contained in the offer involved additional costs to the company except item 5, relating to advance vacation notice. The increase in captains' pay would result in an eight-year captain receiving an increase from \$1,178 to \$1,203 per month.

After receiving the above offer, the meeting recessed and reconvened the following morning on September 24. ALPA's representative stated that the offer "was a good step forward" ^{23/} but that it fell short in the area of pay and completely short in the area of working conditions. The offer was thereupon rejected. At this session Southern's representative stated in substance that the carrier wanted a contract but that the union must get more realistic in its demands. In addition, it was indicated that the carrier wished to purchase more advanced type aircraft, but it was reluctant to do so unless an agreement was reached with the pilots for the operation of such new equipment. With respect to the last matter, the union representative indicated that the pilots would negotiate for the operation of new equipment only after an agreement had been concluded on the basic contract for a DC-3 type of operation. The meeting thereupon ended with no date fixed for resuming negotiations. The record shows that during the above negotiations from September 22 through September 24, 1959, ALPA did not, either in writing or orally, make any counteroffer to the company's proposal or withdraw or amend any of the original demands contained in its "opener."

By letter dated October 9, 1959, the association requested the services of the National Mediation Board to mediate the dispute. Thereafter the parties were advised by the National Mediation Board that the application had been docketed as Case No. A-6102. Ultimately, Mediator James M. Holaren was named as mediator and met with representatives of the association and the carrier in the Federal Building in Atlanta beginning on January 20, 1960. The first three days of this session were occupied mainly with a detailed explanation and discussion of each of the items set out in the union's proposed amendment in the basic contract. For example, ALPA argued in support of each of its demands that they were comparable to benefits contained in other local service airline contracts while the carrier objected to certain of the proposals on the grounds that there would be a loss in productivity and substantially increased costs to the company which would have the effect of increasing its subsidy requirements. In connection with ALPA's contentions it may be noted that the union's "opener" admittedly contained several so-called "pioneering" items which were not a part of existing agreements.

^{23/} Tr. p. 59.

with other comparable air carriers. With respect to the carrier's contentions relating to increased costs, the record shows that during the mediation session on January 25, 1960, Southern submitted to the mediator and to ALPA estimates of the additional costs that it would incur if all of the union's proposals were accepted. Such costs were estimated in excess of \$732,000 annually on the basis of 100 pilots employed. This represented about a 75 percent increase over the total pilot expenses of some \$1,062,000 incurred by the carrier in the calendar year 1959.

In discussing the company's computations of the above costs, ALPA agreed that the estimates as to the majority of the items involved were reasonable but took exception to those estimates relating to "Standby Duty" (Section 11(d) and (g)), "Trip Hour Pay" (Section 19(e)) and "School Pay Guarantees" (Section 29), on the grounds that they were too high and not comparable to those incurred by other local service carriers. Although the ALPA representative, in answer to a query by the mediator, conceded that the association itself had costed out the various items contained in its proposal, no such computations were submitted either at the mediation session on January 25, 1960, or at any time thereafter. Certainly, if ALPA had in its possession data tending to show that the overall costs of its proposal were considerably less than those shown in the carrier estimates, it would seem to have been incumbent upon ALPA to bring such factual matters to the attention of the mediator and the carrier representatives. The mere contention of one party that the estimates of an opposing party are in error, or too high, or are improperly computed carries relatively little weight in the absence of bringing forward allegedly correct estimates said to be in the possession of the contradictor. Accordingly, insofar as the record herein is concerned, it must be concluded that ALPA substantially acceded to much of the cost estimates submitted by the carrier.

At the mediation session held on January 26, 1960, Southern's representative submitted to the mediator and to the ALPA representatives a company "package" offer based on the so-called "Boulware concept."²⁴ This proposal differed in a number of important respects from the first offer made in earlier negotiations on September 23, 1959. It included: (1) proposed rates for new equipment; (2) DC-3 pilot pay for an eight-year captain would be raised to \$1,245.53 on February 1, 1960, and further raised to \$1,321.75 on February 1, 1961, which would represent an increase

²⁴ It was explained at the hearing that the "Boulware concept" takes its name from an official of the General Electric Company who some years ago introduced a technique in collective bargaining whereby, after a reasonable period of negotiations, a final and best offer is put forward beyond which, the offerer refuses to go further.

of \$143 per month over the period of the two-year contract; (3) a proposal for incentive pay; and (4) a duration clause which made the contract effective on February 1, 1960, and to expire on January 31, 1962, with no retroactive pay. The ALPA representatives were given to understand that this was the maximum offer the carrier would advance.

Upon receipt of the above offer, the ALPA representatives retired to an adjoining room for private consultations. The record shows that after about an hour of separate discussions, the mediation session resumed at which time Southern's offer was rejected. As basis for the rejection, Mr. Pashkov, chief negotiator for the association, stated in effect that although the pilots' pay offer by the company was sufficient, the pay for copilots was not. He further asserted that working conditions contained in the company's offer were insufficient; that the contract would have to be fully retroactive; that any discussion relating to new aircraft rates and incentive pay would have to wait until an agreement was reached on the basic contract; and that the duration of the agreement as proposed by the company was too long.

In answer to a query from the mediator, Mr. Erle Phillips, one of the company's negotiators, stated that the proposal just rejected constituted the company's best offer and that he could see no reason for additional meetings. ALPA's spokesman told the mediator that Southern's proposal formed a basis for additional negotiations but that the carrier's offer still did not compare with other comparable airline contracts. While admitting that the company had made an offer which would permit further negotiations, ALPA failed to withdraw, amend, or make the least concession with respect to any of the items contained in its original "opener." Moreover, the association's principal negotiator, Mr. Pashkov, admitted on cross-examination that although ALPA wanted conditions similar to those enjoyed by pilots working for comparable airlines it, ALPA, had not withdrawn or amended any of the so-called "pioneering" demands contained in its "opener" -- such as pay for stops of less than 10 minutes' duration or operational duty pay--none of which were then contained in any existing airline contract. In passing, it may be noted that the above two "pioneering" items alone involved additional costs to the carrier of \$32,120 and \$78,840, respectively, or a total of nearly \$111,000 annually--estimates which ALPA's principal negotiator testified he did not dispute.

With the parties obviously deadlocked, the mediation sessions were terminated on January 26, 1960. The next step in the series of efforts to reach an agreement was the receipt of a letter by Southern and ALPA from the executive secretary of the Mediation Board dated February 9, 1960,

requesting that they agree to submit the controversy for arbitration, as provided in Section 8 of the Railway Labor Act. Both ALPA and Southern declined the offer of arbitration. Subsequently, the Mediation Board by letter dated February 17, 1960, notified the parties that its services in the dispute were being terminated as of that date.

Later the association notified the Mediation Board by telegram dated April 25, 1960, that the pilots employed by Southern had established May 4, 1960, for withdrawal from the company's service. The reason assigned for this action was the failure to reach an agreement under the processes of the Railway Labor Act, including negotiation and proffer of arbitration. The carrier was also notified of this proposed action by telegram dated May 2, 1960.

The following day the Mediation Board sent another telegram to ALPA requesting that the strike date be postponed pending emergency mediation sessions suggested to be held on May 5, 1960, with Mediator Frank Switzer in Atlanta. The association acceded to this request and on the date assigned mediation sessions took place in the Georgian Hotel in that city. The sessions were attended by representatives of both ALPA and the carrier with Mr. Switzer presiding. Both joint and separate meetings were held. These meetings were totally unproductive in working out an agreement acceptable to both sides. The position taken by ALPA was basically the same as that taken previously, while Southern's position was that its earlier package offer was a good one from which it saw no reason to deviate.

The testimony of Mr. Pashkov, principal negotiator for ALPA, with respect to what transpired at one of the separate meetings between ALPA and the mediator is illuminating, however, particularly as it relates to whether the union had withdrawn any of the demands contained in its "opener." At one separate meeting ALPA, in outlining the union's proposal to the mediator, made reference to its demands for a "duty rig" and for "operational duty pay." According to Mr. Pashkov, the mediator stated that "He didn't see how we could ever obtain these items."^{25/} In other testimony Mr. Pashkov stated that he had indicated to company representatives that ALPA's proposal was not a "take it or leave it" deal--leaving the implication that the union would withdraw some of its demands.^{26/} However, there is not a scintilla of evidence in the record tending to show that ALPA up to this time had made to the carrier, either orally or in

25/ Tr. p. 121.

26/ Tr. p. 74.

- 21 -

writing, an offer to withdraw, amend, or change in the least any of its original demands. Moreover, there is no substantial evidence which would support a finding that the carrier or its representatives had any indirect knowledge of ALPA's alleged willingness to make concessions with respect to the demands contained in the union's "opener."

Following the fruitless negotiations outlined above, the Mediation Board by telegram dated May 6, 1960, once more advised the parties that it was terminating its efforts to settle the dispute. Thereafter, on May 16, 1960, the Mediation Board again wired the parties stating that it had reviewed past efforts in the matter and had concluded that a further effort should be made to bring the parties to an agreement. The above telegram, addressed to Mr. Clarence N. Sayen, president of ALPA, and Mr. Frank W. Hulse, president of Southern, invited both parties to meet at the Mediation Board's Washington offices on May 19, 1960. The telegram requested that in the event neither of the above principals could personally attend such conferences "* * * that your representative be fully authorized to represent you and your company or organization." 27/

Both parties acceded to the above requests, and meetings were held with then Chairman Robert Boyd in the National Mediation Board's offices in Washington on May 19 and 20, 1960. In addition to the members of the negotiating committees heretofore representing the respective parties, Mr. Kay McMurray, then executive vice president of ALPA (now executive administrator of ALPA), participated in the discussions--acting as a sort of go-between with the respective committees representing the pilots and the company.

In response to a request from Mr. Boyd, ALPA submitted a list of items it believed essential before an agreement could be reached. 28/ These demands were to a large extent the same as those contained in ALPA's original "opener" except two new items were added. One such item (No. 11) contemplated an amendment to the company operational manual which would delete a section therefrom forbidding married pilots from dating stewardesses. The second item new to the negotiations (No. 16), requested that in the event the company acquired certain new aircraft an additional flight crew member would have to be added. One major item, however, which was contained in ALPA's "opener" and omitted from its proposal of May 19 relates to its request for operational duty pay--an item which the company had calculated would cost \$78,840 annually.

27/ ALPA Ex. 30.

28/ ALPA Ex. 31.

At these sessions Southern also submitted a written offer which, however, was the same in most major respects as the carrier's offer made on January 26, 1960. The only significant differences between the two proposals appear to be that in the May 20 offer the company included a limitation on supervisory flying and also provided for partial retroactivity. In addition, although DC-3 rates remained the same, proposed rates for new equipment were increased from \$1,423 to \$1,483 in the first phase and in the second phase, effective April 21, 1961, they were increased to \$1,543 as compared with the January 26 offer of \$1,498. The offer also contained a 21 months' duration clause whereas the earlier offer contemplated a two-year contract.

Insofar as any counteroffer by the union was concerned about the only meaningful results that came out of the May 19 and 20 meetings in Washington were the elimination of the operational duty pay from ALPA's original proposal 29/ and a tentative suggestion made orally by Mr. McMurray that he would endeavor to have the union drop its "duty rig" demand, 30/ if the company would raise its money offer with respect to wages. However, no firm offer was made with respect to the latter item. In fact, there is some testimony tending to show that ALPA's president, Mr. Sayen, would first have to be consulted before a commitment to drop the "duty rig" could be made. The record fails to show that the company increased its wage offer for existing equipment or that ALPA gave any indication as to the amount of additional wages it would require before dropping the "duty rig" demand. During the course of these meetings a suggestion was made by the mediator that the dispute be submitted for arbitration. ALPA agreed to this suggestion while the company refused on the ground that the parties were far apart on too many issues with the subject of wages being only one of the issues involved.

By telegram dated May 23, 1960, Chairman Boyd of the Mediation Board postponed additional conferences scheduled for the following day and formally suggested that the parties agree to submit the dispute to arbitration procedure. ALPA accepted while Southern refused the offer of arbitration. Thereafter, on June 2, 1960, ALPA wired the Mediation Board that the pilots would withdraw from Southern's service at 6 p.m. on June 5, 1960. The strike began on that date.

The record shows that on the evening prior to the strike Mr. Pashkov arrived in Atlanta and was advised, in a telephone conversation with Mr. William Magill, Southern's vice president of operations, that Mr. Phillips was absent from the city and that the company had no interest.

29/ Item 4, Section 5(c) and item 8, Section 12(e) of ALPA's proposal.

30/ Item 14, Section 19(e) of ALPA's proposal.

- 23 -

in further meetings. It also appears from the record that shortly after the strike began an attempt--apparently with the tacit approval of both parties--was made by Southern's chief pilot in the Memphis area, one Captain Wallace Wigley, to work out a solution which would result in a termination of the pilots' work stoppage. 31/ To this end conversations were had on June 9 and 10, 1960, by Captain Wigley with representatives of the company and the pilots' negotiating group.

A joint meeting between the parties on June 10, 1960, was totally unproductive. It appears that up until the time of these conversations Captain Wigley had very little knowledge of the issues involved. While he subsequently went over these matters with the pilots' committee he apparently still did not know the extent of the dispute at the time of the above joint meetings between the parties. This may be seen from the fact that at that time he was under the impression that only three items, i.e., meal allowance, duration of contract, and duty rig, remained to be resolved. 32/ The record shows, however, that the pilots' committee also wanted to discuss "trip bid integrity" and a number of other items before concluding an agreement on a contract. There is little doubt that Captain Wigley entered the somewhat charged atmosphere of these negotiations in good faith, but it is also clear that he lacked the qualifications and experience of a professional negotiator and his efforts were probably ordained to fail before he began. Torn between his loyalty to the company, of which he was a supervisory employee, and to the pilots, Captain Wigley chose to support the latter and on June 11, 1960, he again proffered his resignation--which he had first tendered a few days earlier--as chief pilot at the Memphis base. In reply to a question as to what prompted his resignation Captain Wigley stated:

"Well, it was a hard decision to make, but it amounted to one thing and one thing only. This was clear with me, it was a battle to the finish.

"I elected to fight with my friends instead of against them. That is what decided me." 33/

31/ Captain Wigley had been a member of ALPA for a number of years prior to his resignation in 1957 when he became chief pilot for Southern. At the time of the hearing he was not an ALPA member but was receiving the same strike benefits as other line captains. * * * because he was in sympathy with their [ALPA] position." Tr. p. 351.

32/ Tr. p. 367.

33/ Tr. p. 372.

The next development in the dispute was a telegraphic request dated July 7, from the Mediation Board suggesting that representatives of Southern and ALPA meet for further discussions at the Mediation Board's offices in Washington on July 11, 1960. Both parties agreed and meetings were held on July 11 and 12 in Washington with Mr. E. C. Thompson, executive secretary of the Mediation Board, acting as mediator. At the latter's request ALPA submitted on July 11 a proposal setting forth the items it desired before a settlement could be reached.^{34/} This proposal contained an important concession by withdrawing the union's demand for a "duty rig" which theretofore had been a strong bone of contention between the parties. In fact, Mr. Kay McMurray, principal spokesman for the association at these sessions, testified: "This is the first written proposal wherein the pilot group agreed to withdraw the request for duty rig."^{35/} The proposal also brought into discussion for the first time two new demands: (1) a seniority provision for pilots then on strike (Item 14); and (2) a provision enabling striking pilots to be returned to service without reprisal (Item 15). The association's offer was found unacceptable by Southern on a number of grounds. In addition to opposing the two new demands, the carrier found the proposal objectionable because it called for retroactivity (Item 2); a meal allowance of 30¢ per hour (Item 5); an 85-hour pay cap (Item 12); and provided that a trip bid holding pilot could not be assigned for additional trips without his permission (Item 9).

On the following day, i.e., July 12, 1960, Southern submitted a counterproposal which, with certain exceptions, was basically similar to its earlier offer made at the mediation sessions on May 19 and 20, 1960.^{36/} These exceptions included Items 5 and 6 which provided (a) that pilots then employed and working would have seniority over strikers returning to work and (b) a provision for disciplinary action against pilots who engaged in misconduct during the strike. ALPA's reaction to the counterproposal is best illustrated by Mr. McMurray's testimony on direct examination. He stated:

"Well, when we saw the last two items [Nos. 5 and 6] which brought into serious focus for the first time the problem of the newly employed people, when I discussed it with the Pilot Committee it was quite obvious that this was something we could never accept."

^{34/} ALPA Exhibit 42.

^{35/} Tr. p. 303.

^{36/} ALPA Exhibit 43.

or agree to and that brought to a halt all of the discussions." ^{37/}

While in at least partial, if not full, agreement with other items contained in the company's counterproposal, ALPA also took strong exception to that part of the counterproposal which deferred the effective dates of the proposed pay scales to July 15, 1960, and July 15, 1961. Mr. McMurray indicated that in his opinion the position taken by the carrier represented a "gigging" of the pilot group and was not consistent toward promoting an agreement. After further informal discussions, the parties concluded that they were still too far apart in trying to resolve the existing stalemate, and the meetings with Mr. Thompson of the Mediation Board were adjourned.

With the strike in progress still another meeting was held in Atlanta on July 21, 1960, apparently at the request of Member Leverett Edwards of the Mediation Board. ^{38/} This meeting brought together for the first time Mr. Clarence Sayen, president of ALPA, and Mr. Frank W. Hulse, president of Southern, with Mr. Edwards as mediator. It was totally unproductive, however, and brought forth no new proposals or counterproposals from either side. As Mr. Sayen testified: "There was some discussion of the overall problem, but I don't think we ever came to grips with the issues." ^{39/} About the only meeting of the minds reached was an indication from ALPA that it would continue to prosecute the dispute with its total resources and a similar indication from Southern. The result was a stalemate as great, if not greater, as theretofore existed.

A final meeting between representatives of the disputants was held in Atlanta on July 27 and 28, 1960. These sessions were initially instigated by Mayor Hartsfield of Atlanta who had held discussions with the various parties concerning the impact the strike was having on the people in his community. Arrangements were formally made by the Mediation Board in telegrams dated July 25, 1960, addressed to ALPA and Southern. Attending the meetings were Mr. Sayen and other representatives for the union, while Mr. Hulse and others represented the company, with Mr. Leverett Edwards again acting as mediator.

At the first meeting Mr. Edwards went through ALPA's contract demands paragraph by paragraph, and item by item, and requested that the parties indicate their agreement or disagreement with each item. After this had been completed the mediator prepared a list of the unresolved issues and a list of the

^{37/} Tr. pp. 303-304.

^{38/} Mr. Sayen testified that he did not recall whether he had received a telegram or a telephone call from Mr. Edwards suggesting the meeting. Tr. p. 487.

^{39/} Tr. p. 490.

2638

provisions agreed upon. Thereafter, Mr. Edwards proceeded to issue what he termed an "advisory arbitration award" which was written on a blackboard by the mediator. Other than notes taken by the parties there was no exact record made as to the detailed findings made by the mediator. ^{40/} Nevertheless, from other evidence of record herein, it is apparent that the mediator made recommendations for settlement including pilots' pay for both DC-3 and new equipment to be acquired by the company, meal allowance, pensions, duration, additional flight crew members, and working rules.

By letter dated July 28, 1960, signed by Mr. Clifton Miller, chairman of the pilots' negotiating committee, ALPA accepted the mediator's proposal for settlement. By letter of the same date signed by Mr. Erle Phillips, attorney, Southern also accepted the mediator's proposals except insofar as they related to the suggested duration of the contract. In its letter Southern also stated that its acceptance was without prejudice to its position relating to: (1) seniority, (2) disciplinary action, and (3) parking of aircraft. In connection with the question of seniority the company stated that it had employed nearly 100 pilots since the strike began and would require only about 40 additional pilots, who would be returned to service with their seniority dating from the date they returned to work. With respect to disciplinary action the carrier also indicated that it reserved the right to take such action, including ineligibility to return to service, in the case of pilots who had engaged in misconduct during the strike. As far as parking of aircraft was concerned, the carrier stated that any agreement finally executed would have to provide for pilots parking and moving aircraft. None of the above items were considered, i.e., allowed or disallowed, in the mediator's "advisory arbitration award."

Subsequent to the adjournment of the July 27 and 28, 1960, meeting with Mr. Edwards and the acceptance of the mediator's proposal by ALPA and the contingent acceptance of the same proposal by Southern, no further meetings between the parties looking toward a settlement of this dispute have been held.

Conclusions

For reasons stated in the forepart of this decision it has been found that the Board, as a matter of law, has jurisdiction to resolve the issues raised by the pleadings in this proceeding. Aside from the expressed provisions of the statute, which leave little doubt as to its responsibilities in the instant matter, there exists an implicit

^{40/} There is testimony showing that Mr. Edwards took a photograph of the contents of the blackboard "advisory arbitration award" which is presumably in the files of the Mediation Board.

duty in the Board to invoke the broad investigatory powers conferred by Section 1002 of the Act where public interest factors are involved and where the matters complained of might jeopardize the free flow of commerce conducted pursuant to a certificate of public convenience and necessity. Otherwise, the fulfillment of the policy declarations contained in Section 102 of the Act could be severely impaired. This is all the more true where, as in the instant case, the administrative agencies charged with the primary responsibility of aiding in the settlement of disputes of this nature have been fully resorted to and have been found wanting in the legal authority to make a final determination of the questions involved. Under such circumstances it seems academic that the Board has no other choice but to make a decision on the issues presented by this controversy.

With the question of jurisdiction settled there is only one real issue left to be determined. Stated in its simplest terms that issue is: Did Southern bargain in good faith in an effort to reach an agreement on a labor contract with its pilot employees? 41/

As noted earlier, Section 401(k)(4) of the Act requires compliance by an air carrier with Title II of the Railway Labor Act, as amended, as a condition to the holding of a certificate. Section 202 of Title II makes all the duties, requirements, penalties, benefits, and privileges prescribed and established in Title I, except Section 3 thereof, applicable to air carriers and their employees. Thus, Title I, Section 2, First, of the Railway Labor Act which makes it "the duty of all air carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes * * *" is

41/ As pointed out before, the complaint also raises questions with respect to whether Southern's relations with other crafts and classes of employees have been marked by a continuing deterioration because of the company's alleged refusal to comply with its obligations as a certificated air carrier. However, the only substantial evidence of record connected with these charges consists of two exhibits: one, (Southern's Exhibit No. 2) being a copy of a decision by Federal District Judge Boyd Sloan, dated September 21, 1959, in which a strike by the Air Carrier Mechanics Association (ACMA) was found to be illegal; and two, (Southern's Exhibit No. 3) being a copy of a current labor contract between Southern and the Air Line Dispatchers Association, A.F.L., executed by both parties on August 19, 1959, and scheduled to be in full force and effect until June 1, 1961. Obviously, the foregoing documents do not support charges of a continuing deterioration in Southern's relations with other crafts and classes of employees.

not only applicable to the carrier but also imposes the same duty upon the employees. In other words, the statutory requirements properly applied demanded good faith bargaining in the instant case not only by Southern but by ALPA, as the duly designated representative of the pilot employees, as well.

The elements going to make up good faith bargaining have been the subject of consideration in a large number of judicial decisions, ^{42/} some involving the Railway Labor Act and the majority being concerned with Section 8 of the Labor Management Relations Act. ^{43/} The former requires that the parties "exert every reasonable effort" to make and maintain an agreement while the latter Act requires the parties to "bargain collectively." With respect to the difference in wording in the respective provisions of those statutes, the court in the McMullans case, supra, stated:

"It is urged that the bargaining language of the National Labor Relations Act is broader than that of the Railway Labor Act * * *. While there is some difference in the wording of the two provisions, we think that they were intended to include substantially the same subjects."

(Page 55).

Similarly, in Norfolk & Portsmouth Belt Line Ry. Co. v. Brotherhood of Railroad Trainmen, 248 F. 2d 34 the court held:

"The negotiation required by the Act is the same 'good faith' bargaining required by the Labor Management Relations Act * * *." (Page 45, footnote 6).

In American Airlines, supra, which provides a good cross-section of opinion on the subject, Judge Bryan discussed at length the various factors to be considered in determining what constitutes bargaining in good faith. He concluded:

"The requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all." (Page 794).

^{42/} E.g., Labor Board v. Insurance Agents, 361 U.S. 477; McMullans v. Kansas, Oklahoma and Gulf Railway Co., 229 F. 2d 50; Brotherhood, Etc. v. Atlantic Coast Line R. Co., 201 F. 2d 36; Rapid Roller Co. v. National Labor Relations Board, 126 F. 2d 452; National Labor R. Board v. George P. Pilling & Sons Co., 119 F. 2d 32; National Labor Relations Board v. Boss Mfg. Co., 118 F. 2d 187; American Airlines, Inc. v. Air Line Pilots Ass'n, Inter., 169 F. Supp. 777.

^{43/} 29 U.S.C.A. Section 158.

As supporting the above finding, the court cited at page 794 the standards applied in N.L.R.B. v. Reed & Prince Mfg. Co., 1 Cir., 205 F. 2d 131, certiorari denied 346 U.S. 887, as set forth in the following quotes:

"Thus if * * * [a party] can find nothing whatever to agree to * * * and makes not a single serious proposal meeting the [other party] at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach agreement * * *. In other words, while the Board cannot force * * * [a party] * * to make a "concession" on any specific issue or to adopt any particular position, the [party] * * * is obliged to make some reasonable effort in some direction to compose his differences * * * if § 8(a) (5) [the duty to bargain collectively] is to be read as imposing any substantial obligation at all * * *."

Another authority cited by Judge Bryan in American Airlines, supra, at page 794 is the decision in N.L.R.B. v. United Clay Mines Corp., 6 Cir., 219 F. 2d 120, which reversed a National Labor Relations Board finding that the employer was guilty of unfair labor practice by refusing to bargain in good faith. As a demonstration that the lack of good faith can be shown only by conduct clearly exhibiting an intent not to enter into a contract, the court quoted from the above decision as follows:

"We find nothing in the Act which requires * * * [the abandonment of] a settled position on a certain issue because of either the quantity or quality of concessions * * *. It is not for * * * the Court to determine what in their opinion the respondent should have agreed to, and, in effect, make the contract for the parties. [The Board's order] would, as a practical matter, force the respondent to make a concession * * *. While the Act compels negotiations, which usually result in reaching an agreement, it contains no authority to force an agreement where the parties have reached an impasse. [Citing cases]."

Still another case cited by Judge Bryan at page 794 of his decision is N.L.R.B. v. P. Lorillard Co., 6 Cir., 117 F. 2d 921, reversed on other grounds 314 U.S. 512, in which the court denied enforcement of an order of the National Labor Relations Board based on a finding of a lack of good faith bargaining on the part of an employer. As an additional indication of the standards to be applied in cases of this nature, the court quoted as follows from the Lorillard case:

"(1) '[A party] * * * is free frankly to state the terms upon which he may yield and those upon which he will not yield.'

"(2) '[A test under the statute] is the length of time involved in the negotiations and the persistence with which [the party] * * * offers opportunity for agreement.'

2642

"(3) * * * the record does not show that the respondent had a fixed resolve not to enter into an agreement."

From a review of the case law on the subject, it is abundantly clear that the criteria of good faith bargaining is not met by going forth "armed with a crank handle" as mentioned at page 460 in the Rapid Roller case, supra, or is it essential that there be complete capitulation by one of the parties in order that an agreement may be reached. ^{44/} Moreover, the great weight of authority holds that "hard bargaining" is not an element tending to establish bad faith. This is aptly illustrated in Labor Board v. Insurance Agents, supra, where Mr. Justice Brennan, speaking for the Supreme Court said:

"It must be realized that collective bargaining under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values."

Applied to the instant case the prime test is whether the negotiators for Southern made an honest and fair effort to reach an agreement. This must be decided, not on the basis of charges of "union busting" or other acrimonious allegations but solely on the basis of an analysis of the offers and counteroffers, if any, and other germane factors arising during the course of the negotiations.

Before proceeding further—although it is so well established it is probably unnecessary to point out—there is no legal requirement, either under the Railway Labor Act or the Labor Management Relations Act, which imposes any compulsion on either party to execute an agreement. Whatever questions exist with respect to the essential constituents going to make up good faith bargaining, there are none at all which cast doubt on the right of either party to reject an offer, refuse to make a concession, follow the recommendations of the Mediation Board or agree to arbitrate. While this may appear to be the antithesis of collective bargaining which is expected to bear fruit, it rests upon the admonition contained in the Railway Labor Act which requires the parties to "exert every reasonable effort" to adjust their differences—without the constraint of law. As stated by Mr. Justice Brennan in the Insurance Agents case, supra:

^{44/} National Labor Relations Board v. Mayer, 196 F. 2d 286, 290.

" * * * Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." (Page 488).

When arrayed against the background of the applicable law on the subject, the evidence of record fails to support a finding that Southern, during the course of its negotiations with ALPA, was not acting in good faith or was it bent upon a course of action that would bar the reaching of an agreement with its pilot employees.

At the time negotiations first commenced, i.e., September 22, 1959, Southern was in the process of recovering from the effects of a walkout by its mechanics—members of the Air Carrier Mechanics Association (ACMA), a union group affiliated with ALPA. As pointed out earlier that strike upon petition by the carrier was found to be "illegal" by a Federal District Court. While the record does not show specifically that the parties at these first meetings were tense in the ordinary sense of the term, there is little doubt but the negotiators on both sides were engaged in the proverbial "cat and mouse" game with neither one not entirely free from suspicion of the other. That the apparently unsuccessful strike of the mechanics was still much in the minds of the parties may be seen from the fact that Mr. Pashkov, principal negotiator for ALPA, brought up the question of settling the ACMA dispute during the very first session of the negotiations. It was probably an unfortunate coincidence that the meetings involving a new labor agreement with the pilots came so close on the heels of the mechanics' controversy without at least a reasonable "cooling off" period.

Nevertheless, on the second day of the first meetings, i.e., September 23, 1959, the carrier presented a counteroffer to ALPA which included an increase in pay of \$25 for an eight-year captain flying 85 hours, one-half day and one-half night, bringing his basic pay up from \$1,178 to \$1,203 per month. The company also proposed to increase the copilot percentages of captain pay by 1 percent which would increase the percentages to 42 percent starting with the third year, 47 percent in the fourth year, and 52 percent for copilots in their fifth year and thereafter. In addition to the pay increases, the company proposed increased benefits in the area of reporting pay, minimum monthly guarantee for reserve pilots during vacation, vacation notice, full pay for deadheading, and increased sick leave. The company also presented an incentive plan which it asserted would result in improved performance by the pilots and in turn would make available approximately \$60,000 in additional pay per year for the pilots as a group. As noted before, ALPA refused to consider the incentive plan until an agreement was reached on the basic contract.

Although conceding that Southern's offer "was a good step forward" the association refused to make any concessions on its part. It continually insisted that it was merely seeking a contract with Southern

2844

which would be comparable to those ALPA had with other similar carriers. Yet it conceded that its "opener" involved demands for benefits which were not only equal to but were in excess of some other local service contracts at that time. It also admitted that its "openers" have frequently involved the so-called "leap frog technique," i.e., including demands for benefits beyond those in existing contracts. However, the association's principal negotiator candidly admitted on cross-examination " * * * but that is not saying that we get what we request in our openers." 45/

In connection with the question of comparability of contracts the record shows that while the total pay costs of contracts with other local service carriers—at the time negotiations were being conducted with Southern—were generally higher than the \$1,267 rate per month demanded of Southern, this factor alone cannot be employed as a true measurement of comparability. Because of the additional expenditures required to meet demands relating to revisions in working rules and working conditions (the exact amount of which is not definitely determinable from the record), Southern's costs could well have been much greater. For example, contracts negotiated with Central Airlines, Inc., and Trans-Texas Airways did not include provision for a "duty rig." As shown earlier, this item alone involved a very substantial sum. In addition, certain other "pioneering" items such as operational duty pay, and pay for stops of less than 10 minutes' duration—estimated to cost over \$110,000 annually—were not at that time contained in any existing local service air carrier contract.

While the company's first offer was admittedly a low opening one—not abnormal in the give and take of collective bargaining—and was no doubt intended to draw some concessions from the association, the record fails to show that the union receded in the slightest from any of its original demands. In other words, it just stood pat. While it was not legally required to do so, it would seem that good faith bargaining made it incumbent on ALPA to make some move, however minor, which would give an indication to the negotiators on the opposite side of the table that the pilots themselves were not negotiating from an all or nothing position. A simple platitude announcing that the company had taken "a good step forward," hardly suffices. In any event, it is clear that the carrier's counter-offer was not indicative of a mind bent on not reaching an agreement—quite the contrary appears to be true.

Even long after the services of the National Mediation Board had been invoked, ALPA remained adamant in refusing to make any concessions on its own part. In the meetings held with Mediator Holaren in January 1959 Southern made another offer based on the so-called "Boulware concept," 46/ which would have resulted in an increase of \$143 per month

45/ Tr. p. 218.

46/ See footnote 24, supra.

in the pay of an eight-year captain, plus other benefits, over the two-year term of the contract.

The details of the above offer are reviewed elsewhere herein and need not be repeated. It is sufficient to say that the company's offer was a substantial one and if ever there was a period in the negotiations which required the union to take some affirmative action showing that it too wanted to reach an agreement, this was the time. Yet, ALPA's chief negotiator, Mr. Pashkov, while conceding that the company's pay offer for pilots was sufficient, rejected the entire offer because the proposed pay for copilots was not high enough, working conditions and other benefits did not meet ALPA's "opener" demands, and the two-year duration clause proposed by the carrier was too long.

It is apparent that while Southern had taken another "good step forward," it had not, in the union's mind, marched up to the finish line in meeting all of the demands contained in the association's "opener." No other interpretation can be placed on the refusal to amend or withdraw any of ALPA's demands, including a number of "pioneering" items not then in the contracts of any comparable carrier. If ALPA truly wanted to reach an agreement—on other than strictly its own terms—its unyielding attitude at this time is difficult to understand. This is particularly true when viewed in the light of Mr. Pashkov's recognition of the fact that the union does not always get "what we request in our openers." Moreover, the association's perfunctory rejection of the company's January 1960 offer, after about only one hour's consideration, is equally difficult to equate with Title I, Section 2, First, of the Railway Labor Act, which requires not only that carriers, their officers and agents, but also their employees to "exert every reasonable effort to make and maintain agreements," etc.

Under the circumstances shown above, no finding is possible other than one holding that Southern up to this period in the negotiations was engaged in good faith bargaining and was actively striving to reach accord with its pilot employees on a contract.

In the mediation sessions held in Atlanta on May 5, 1960, with Mediator Switzer, following the break-off of the January 1960 mediation efforts, the refusal to arbitrate by both parties and the fixing of a strike date for May 4, 1960, by ALPA and the subsequent temporary postponement thereof, both parties still adhered to their earlier positions. At this juncture in the dispute it must have been obvious to both sides that the situation was becoming alarmingly serious, with the possibility of a disruption in Southern's service and consequent inconvenience to a large segment of the public, looming very real. While neither of the parties can be completely absolved for the utter lack of effort to reach agreement demonstrated at the May 5, 1960, meeting, the equities of the situation required that ALPA at least make some conciliatory move toward breaking the deadlock.

2646

The company had already made two counteroffers—the last one of which contained substantial gains for the pilots. At this point ALPA was presented with a genuine opportunity to demonstrate its good faith by making some concession with respect to the demands in its "opener" even though the company might subsequently regard it as trivial. The mediator actually told Mr. Pashkov he did not see how the union could ever obtain certain of the major items it was demanding. Nevertheless, the ALPA negotiators again stood pat. Mr. Pashkov did testify that he told the company representatives that the association's proposal was not a "take it or leave it deal." This may possibly be true but there is absolutely nothing in the record up to this time which supports such a proposition. Nothing, either orally or in writing, was given by ALPA to the carrier showing that the union was of a mind to withdraw or amend a single sentence or even a word of those contained in its "opener."

It was not until the emergency mediation sessions held in May 1960 with the then chairman of the Mediation Board, Mr. Boyd, did ALPA indicate it was ready to accept anything less than the demands contained in its "opener." At these sessions, Mr. McMurray, executive vice president of ALPA, had supplanted Mr. Pashkov as chief negotiator for the union. His offer withdrawing the pilots' demand for operational duty pay, if forthcoming earlier in the negotiations might well have had a beneficial effect on the ultimate outcome of this dispute.

The new proposal, however, also brought in two new issues for discussion: (1) deletion from the company's operational manual of the section forbidding married pilots from dating stewardesses; and (2) the addition of another flight crew member on new aircraft. The first item did not constitute any major stumbling block to reaching an agreement but the second demand was a money item, the agreement to which might well have offset the concession made with respect to the demand for operational duty pay. The fact that Mr. McMurray also suggested the possibility the union might withdraw its "duty rig" demand—which appeared to have been a consistent block against reaching an agreement—amounted to very little since it was tied to a condition that the company raise its pay offer. In other words, the tentative suggestion by Mr. McMurray amounted to nothing more than a trade of one thing for something new, i.e., more money, whereby ALPA could possibly achieve the equivalent of its original demands. No criticism is intended to be attached to this hard bargaining position taken by the association. Similarly, no criticism should attach to the carrier, which had also submitted a new offer that contained only a few minor improvements over its January 1960 offer, although the proposed pay rates for the operation of new equipment was rather substantially increased. Both sides were unquestionably engaged in hard bargaining which the statute does not condemn. Likewise, Southern's refusal to agree to submit the dispute to arbitration after ALPA had agreed to such procedure is also not condemned by the statute.

However, it is a sad commentary on the efficacy of collective bargaining procedures which permitted the lapse of these negotiations at a period when the give and take contemplated by the statute was for the first time beginning to take form. This impotency to take more affirmative action toward a solution of the problem was the forerunner of the strike which began at 6 p.m. on June 5, 1960, with all its adverse effects not only on the pilots and the carrier but equally as important, if not more so, on a large segment of the traveling public.

2648

The entrance of Captain Wigley in his role as intermediary shortly after the strike began has been reviewed earlier and no further findings are necessary in connection with this phase of the dispute.

The emergency meetings held at the National Mediation Board's offices in Washington with Mr. Thompson, executive secretary of that Board, more than five weeks after the strike began, i.e., July 11 and 12, 1960, thoroughly demonstrate the needlessness for the strike having ever occurred. In a new proposal, ALPA for the first time withdrew its "duty rig" demand which, as the record shows, had been one of the principal if not the main deterrent to an agreement. While a few other of the original items were still in dispute they were relatively minor in nature and no doubt could have been resolved. However, ALPA also included for the first time two new demands: one relating to seniority for striking pilots returning to work and the other demanding that no reprisal would be taken against any of the striking pilots after they had returned to service.

Southern's counterproposal, except for two new items, also left little doubt but that there then existed a basis for settling the controversy. The new items injected by the carrier were face to face in opposition to the two new items demanded by ALPA. They included: (1) a provision that replacement pilots have seniority over striking pilots returning to work; and (2) a provision giving the carrier the right to take disciplinary action against pilots who had engaged in misconduct during the strike. Thus, two new issues had been created with both sides taking the position that they would never agree to the demands of the other. As Mr. McMurray stated: *** it was quite obvious that this was something we could never accept or agree to and that brought to a halt all of the discussions."

The meeting with Mr. Sayen, president of ALPA, and Mr. Hulse, president of Southern, with Member Edwards of the Mediation Board on July 21, 1960, in Atlanta further illustrates the absoluteness of the impasse engendered by the "seniority" and "disciplining" items in the latest offer and counteroffer of the association and Southern, respectively. Although Mr. Sayen testified that there was some discussion of the overall problem, the parties never really came to "grips with the issues."

Similarly, the discussions at the final meetings between the top representatives of the parties on July 27 and 28, 1960, held at the suggestion of Mayor Hartsfield of Atlanta, also show that the issues of "seniority" and "disciplinary action" had not been resolved. The "advisory arbitration award" made by Mediator Edwards at the final session, completely bypassed both questions. While not legally binding on either party, the advisory award was accepted by ALPA and also by Southern-- subject to its position relating to (1) seniority, (2) disciplinary action, and (3) parking of aircraft. Although the last-named item had been the subject of some discussion during the course of the negotiations, it was obviously not of such importance as to bar an ultimate agreement between the parties. Accordingly, attention will

be directed to whether Southern, at this stage of the proceeding, had erected the two issues of "seniority" and "disciplinary action" as an artificial barrier to the reaching of an agreement and was thereby demonstrating a lack of good faith bargaining.

Prior to proceeding to this question, it may be noted that the record fully supports a finding, and it is so found that Southern, up to this period in the negotiations, had bargained in good faith with the intention of reaching an agreement with its pilot employees. This is readily seen not only from the carrier's willingness to meet with the union in numerous negotiating sessions and from the various offers put forth by the carrier, but also from other pieces of evidence disclosing that it was looking forward to an agreement rather than a demonstration that it was bent upon a course of action which would bar an accord with its pilots. For example, the carrier, as early as October 1959 began the accrual of funds in anticipation of additional pilot pay, ^{47/} new pilots hired immediately prior to the strike because of the carrier's expanding system requirements were employed without any anti-union bias being exhibited by the company, ^{48/} and even after the strike began--during the ill-fated negotiations conducted with Captain Wigley as the intermediary -- Mr. Hulse, Southern's president, was apparently so hopeful of an agreement that he instructed that the employment of replacement pilots be discontinued. Moreover, there is no evidence showing that Southern actually hired any replacement pilots prior to the strike. Whether or not the carrier, in the last stages of negotiations began to investigate the possibility of hiring replacements in anticipation that a strike might occur does not constitute bad faith bargaining. In view of the fact that the first strike notice was served by ALPA on April 29, 1960,--which was subsequently postponed--the carrier was justified in canvassing the means whereby the public would continue to receive the service to which it was entitled pursuant to Southern's certificate of public convenience and necessity.

^{47/} Copies of General Journal entries introduced in evidence show that Southern had set aside in monthly amounts from October 1959 through May 1960 some 40-odd thousand dollars so that the expense of the anticipated pilot pay increase would be properly reflected retroactively on the books of the carrier at such time as an agreement on a contract would be reached.

^{48/} The record shows that all of the 36 new pilots employed between January 1, 1960, and June 1, 1960, prior to the strike, except one who was a personal friend of the company's president, were apparently members or probationary members of the union and honored the association's strike call.

Although there is some testimony showing that conversations were had between various company officials and certain of probationary pilots with respect to whether the latter would continue to work in the event of a strike, such action, even when given full evidentiary weight, is not an indication that the company was bent on not reaching an agreement. In the light of all of the evidence to the contrary, it must be found that the carrier was merely exercising its prerogative to forestall, if possible, the closing down of its business were a strike ultimately to materialize.

With respect to Southern's insistence on seniority rights for its replacement pilots and the authority to take disciplinary action against those returning pilots found guilty of misconduct, ALPA argues at length that such items were not included in the union's "opener" and, therefore, were not proper items for discussion. This argument is unpersuasive. In the first place, both matters were opened for discussion when ALPA itself first introduced them into the dispute in its proposal made subsequent to the strike, i.e., July 11, 1960. Of course, the union's conditions were diametrically opposed to those later requested by the carrier. In this connection the union's viewpoint is best illustrated by Mr. McMurray's testimony who stated that such items were "standard" and "just another part of cleaning up the problems associated with the withdrawal [the strike]."^{49/}

Entirely aside, however, from the question of which party first injected the questions of "seniority" and "disciplinary action" as conditions precedent to a settlement it is beyond doubt that, had Southern brought in these matters for discussion when the association's "opener" was served—or for that matter at any time prior to the date the strike actually began—its action would have served as an indication of bad faith bargaining. In such circumstances it would be difficult indeed for the carrier to make a convincing showing that it was not guilty of duplicity in embarking on negotiations which, in its view, would not result in an agreement but must inevitably lead to a strike. It is obvious that any reasons the company may have had for including these conditions as bargaining items came into being only after the strike began.

* * * In Labor Board v. Mackay Co., 304 U.S. 333, the Supreme Court held that a company, not otherwise violating the provisions of the Labor Relations Act, may in the course of an economic strike hire replacement employees in an effort to carry on its business and held further, that the company is not bound later to discharge the replacements in order to reinstate the strikers. This principle is well established and has been followed ever since the Mackay decision was rendered in 1938. While the Court, in reversing the Circuit Court of Appeals, also found that the respondent company had unjustly discriminated, because of union activity, against certain employees who requested reinstatement, no such grounds exist in the instant case.

^{49/} Tr. p. 316.

One of the leading cases on the question of seniority of replacement workers is N.L.R.B. v. Potlatch Forests, 189 F. 2d 82. There, the Ninth Circuit Court of Appeals, in denying a petition of the Labor Relations Board for an order of enforcement held that it was not an unfair labor practice in an economic strike to grant superseniority to replacement workers. The court said:

"If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers." (Page 86)

In the above case, which to some extent parallels the situation in the instant proceeding, the court further held:

"The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent'; however, that assurance need not be proved. The Supreme Court in the Mackay Radio Case was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure. In this case Potlatch advocated 'strike seniority' before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter. Potlatch has, since prior to the settlement of the strike, endeavored to make the places of the replacements as nearly permanent as may be. The propriety of this concern was settled in the Mackay Radio case." (Page 86)

The same principle enunciated in the above case is restated by the Seventh Circuit Court of Appeals in the recent decision in N.L.R.B. v. Lewin-Mathes Company, 285 F. 2d 329 (1960). There the court said:

"Having found that the strikers were not unfair labor practice strikers it would necessarily follow that the strikers were economic strikers in which case it would be lawful and proper to grant super-seniority to replacements and we so hold." ^{50/} (Page 333)

In a recent agency case the National Labor Relations Board has apparently decided not to follow the principles set forth by the Ninth

^{50/} See also the finding of the Third Circuit Court of Appeals in Vogue Lingerie, Inc. v. N.L.R.B., 280 F. 2d 224.

2352

Circuit Court of Appeals in the Potlatch case, supra. 51/ In so doing, that Board also seemingly rejects similar pronouncements stated by the Seventh Circuit in the Lewin-Mathes case, supra. In its decision in the Erie Resistor case, supra, the Labor Relations Board stated:

"We respectfully disagree with the Ninth Circuit's aforementioned view with respect to Mackay and superseniority. [footnote citing various law review notes] In our opinion, superseniority is a form of discrimination extending far beyond the employer's right of replacement sanctioned by Mackay, and is, moreover, in direct conflict with the express provisions of the Act prohibiting discrimination."

* * *, it may nevertheless be noted that the facts in the Erie Resistor case, supra, are at least to some extent distinguishable from the facts in the instant proceeding. In the Erie Resistor case, replacement workers were presented with a 20-year superseniority over strikers who might seek reinstatement once a settlement of the strike was reached. In the present case no stipulation of the seniority period was suggested by Southern; the carrier merely requested upon settlement of the strike its replacement pilots would have seniority. This included seniority over those pilots who had been employed for only a few months up to those with a number of years of service with the company. In other words, the seniority contemplated in Southern's condition for settlement of the strike was not unlike that indicated by the Supreme Court in the Mackay case, supra, when it said:

"[The employer] is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled." (Pages 345 and 346; footnote omitted)

ALPA places much emphasis on the argument that, as the duly designated representative of Southern's pilots, it is under a legal obligation not to discriminate against any member of such craft or class in bargaining with a carrier. On this basis it contends that the association could not legally accept the seniority condition advanced by Southern. * * *. Whether or not

51/ Erie Resistor Corporation v. International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, Case No. 6-CA-1790, 132 NLRB No. 51 (decided August 1, 1961).

the carrier in subsequent bargaining sessions might have receded from its position on superseniority and settled for something less, such as a status for the replacements which would not require their discharge in order to reinstate pilots returning to work, cannot be ascertained. ALPA simply refused to discuss the question. One thing is clear, however, and that is Southern did insist that none of the replacement pilots be fired to make room for returning pilots. In this respect the carrier was well within its legal rights.

* * * * *

In connection with the question of taking disciplinary action against pilots found guilty of misconduct during the strike, ALPA argues that Southern's insistence on this right, as a condition to an agreement, constituted a violation of Section 204 of the Railway Labor Act. The latter section provides for an establishment for a System Adjustment Board for the resolution of discipline and grievance cases. The attempt by Southern to bypass such a Board, which had been established, is in ALPA's view a demonstration of bad faith bargaining. 53/

In the first place it must be and it is found that reasonable grounds existed upon which to predicate a showing that various overt acts had occurred after the strike commenced which acts, if subsequently found to be as alleged, involved violence, or threats of violence, against the company's personnel, property, and operations that could not be condoned. This fact is conclusively established, not only by the testimony of various witnesses—which it is not necessary to recite in detail—but also from proceedings leading to the issuance of restraining orders against ALPA by the Chancery Court of Shelby County, Tennessee, on July 6, 1960, and by the Superior Court of Fulton County, Georgia, July 21, 1960. Copies of the above orders were introduced in evidence and constitute a part of the record in this case.

With respect to this evidence, ALPA, during the course of the hearing, objected to the receipt thereof on the grounds that it was: (1) not relevant; (2) that because certain of the evidence was not pinpointed as to time, place, date, and name of the person or persons accused, it was hearsay; and (3) where the evidence did not involve a general officer of ALPA it was also hearsay since ALPA could not be held responsible.

A ruling on the above objections was reserved until the initial decision. Upon review, it is found that the question of alleged misconduct by pilots during the strike is clearly relevant to the issues. One of the principal

53/ On brief ALPA argues: "It also smacks strongly of a deliberate desire to torpedo agreement."

2654

stumbling blocks to final agreement revolved around the justification by Southern — whether it was bargaining in good faith—to insist on the condition in question. As to the admissibility of that portion of the evidence which was not subject to the degree of preciseness for which ALPA argues and to its contention that ALPA cannot be held responsible where it is not shown that a general officer of the association was involved, the objections are also overruled.

In Drivers Union v. Meadowmoor Co., 312 U.S. 287 (1941), the Supreme Court sustained the legality of a State court injunction prohibiting both peaceful picketing as well as acts of violence, where the record revealed that the union members were not identified as participating in all of the violent occurrences. In that case Mr. Justice Frankfurter stated:

"These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders." (Page 295)

and,

"It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondeat superior. [citations omitted]" (Page 295)

In the instant case there is ample evidence as to various specific instances involving identified striking pilots engaged in acts going far beyond those normally sanctioned in peaceful picketing.

It has been long established that an employer is not required to reinstate striking employees guilty of unlawful conduct.^{54/} And the same holds true even though a strike was actuated by unfair labor practices of the employer—which is not the situation here—in such cases the strikers are discharged because of their lawlessness and they cease to remain employees.^{55/} As stated by Mr. Chief Justice Hughes in the Fansteel case, supra:

* * in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon

^{54/} Labor Board v. Fansteel Corp., 306 U.S. 240.

^{55/} Id.

the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.* (Page 253)

and,

"We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work." (Page 255)

While the Fansteel case involved an interpretation of the Labor Management Relations Act, the principles there set forth with respect to misconduct by employees on strike are equally applicable in the instant case. 56/

* * * * *

Moreover, it should again be noted that ALPA itself first injected the issue of "no reprisals" as a condition to an agreement and presumably also sought to thereby eliminate the System Adjustment Board from considering any charges of misconduct involving the striking pilots. There is, of course, no way of ascertaining whether Southern—or for that matter whether ALPA—may have, in discussions across the bargaining table, modified the respective conditions each sought. Such discussions were foreclosed when ALPA, as in the case of the "seniority" question, once more simply refused to discuss the question.

* * * * *

56/ See also Wilson & Co. v. National Labor Relations Board, 120 F. 2d 913, where the Seventh Circuit Court of Appeals citing the Fansteel case, held:

"It therefore appears that there is little, if any, room for argument but that petitioner was within its rights in its position that it be accorded the privilege of selecting from those guilty of violence, the ones which it would reinstate." (Page 924)

2858

In summary, it may be noted that both sides to this dispute were represented by highly experienced teams of negotiators. It can hardly be said that either Mr. McMurray for the union, or Mr. Phillips for the company, were neophytes in the sometimes rough and tumble of collective bargaining. As such, both were well cognizant of the obstacles in the path to final agreement, once the strike had begun and replacement pilots were being hired. It was with the knowledge, no doubt, that the jobs of some of its members might be in jeopardy which prompted ALPA's insistence on the status quo for all pilots returning to work. Southern, in countering with the seniority and disciplinary action conditions, was also equally aware of its obligations to replacement pilots hired on a permanent basis to keep the company operating and thus enabling it to meet its responsibilities to the traveling public pursuant to the demands of its certificate.

The concessions ultimately made by the union after many months of fruitless negotiations and only after the strike was actually in progress is an eloquent illustration of the fact that the strike should never have been permitted to occur in the first place. The reasons underlying the strike's inception, however, cannot properly be placed at the door of Southern. It has been found earlier that up to the date of the strike Southern had not bargained in bad faith. The final impasse--aside from the relatively minor item relating to the parking of aircraft which, obviously would not have barred an ultimate agreement--was a consequence of conditions brought on by the strike not as a result of negotiations which terminated in the strike. * * *

* * * * *

Summary of Findings and Conclusions

In view of the foregoing and on the basis of all of the evidence and facts of record it is found and concluded as follows:

- (1) That, pursuant to the powers vested in it by the Federal Aviation Act of 1958, as amended, the Civil Aeronautics Board has jurisdiction and is empowered to take such action as may be required by the issues raised by the pleadings in this proceeding;
- (2) That Southern Airways, Inc., is a Delaware corporation with its principal office in Atlanta, Georgia, and is engaged in interstate commerce in the transportation of persons, property, and mail by air pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board;
- (3) That Air Line Pilots Association is an unincorporated labor organization duly designated and authorized by the National Mediation Board, under the Railway Labor Act, as amended, to act as the collective bargaining representative of the pilot employees of Southern Airways, Inc.;

(4) That in accord with the provisions of a labor contract between the above-named parties, which became effective July 1, 1958, the Air Line Pilots Association notified Southern Airways, Inc., on July 30, 1959, of its intention to seek changes and modifications of said contract;

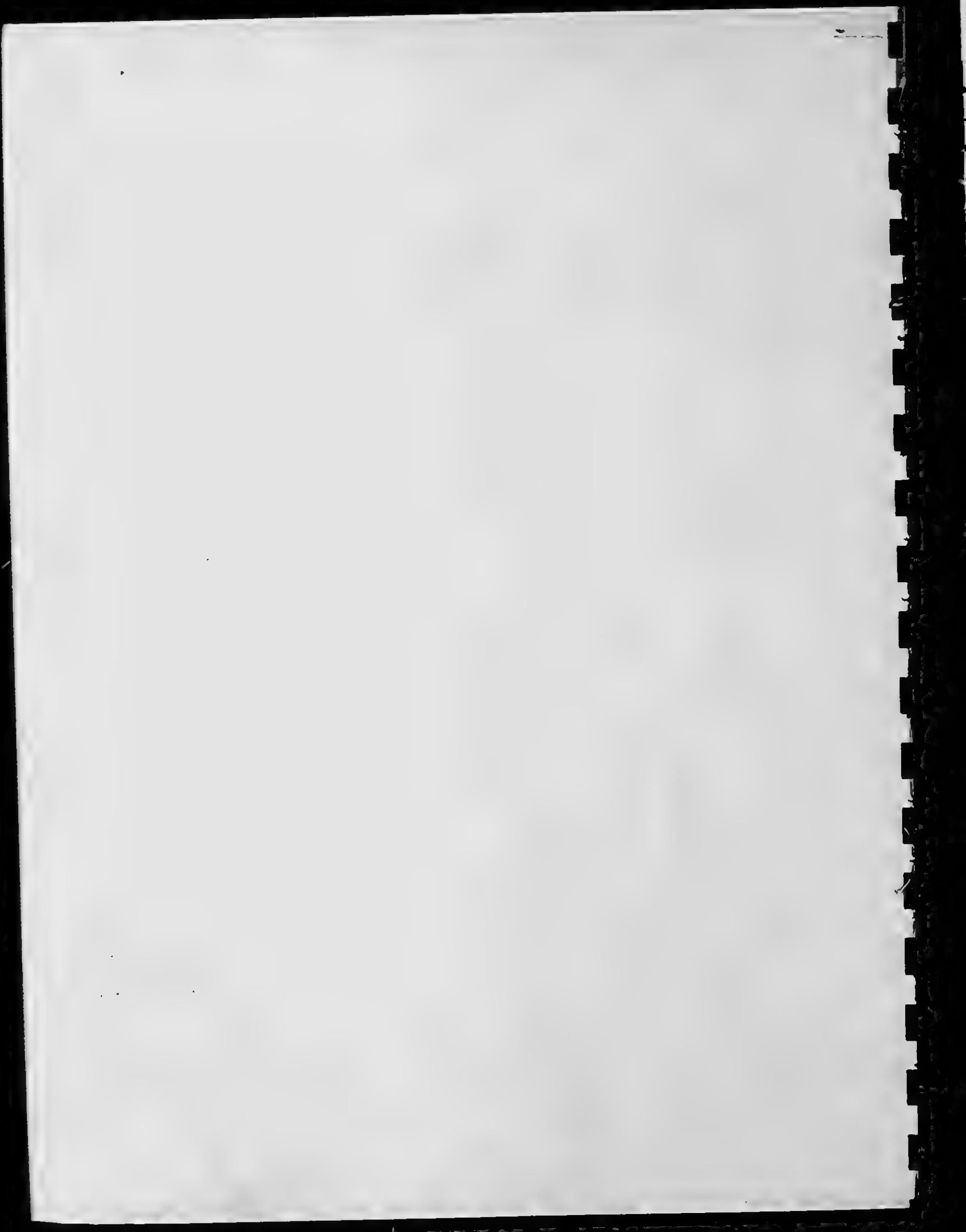
(5) That subsequent negotiations between the said parties, including negotiations conducted with the aid of the National Mediation Board, terminated with the parties unable to reach an agreement on proposed changes looking toward the execution of a new labor contract;

(6) That all of the processes available under the National Mediation Board procedures have been exhausted;

(7) That pilot members of the Air Line Pilots Association withdrew from the service of Southern Airways, Inc., on June 5, 1960, which circumstance continued up to the time the record in this proceeding was closed;

(8) That Southern Airways, Inc., has continued the operations authorized under its certificate with replacement pilots hired on or about the date the strike occurred and thereafter;

* * * * *



[2661]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

In the Matter of the Enforcement)
Proceeding)
AIR LINE PILOTS ASSOCIATION) Docket No. 11654
)
v.)
SOUTHERN AIRWAYS, INC.)

PETITION FOR DIRECTIVE
BY SOUTHERN AIRWAYS, INC.

By Order E-18560 adopted on July 5, 1962, the Civil Aeronautics Board ("Board"), among other things, directed Southern Airways, Inc. ("Southern") to bargain collectively with the Air Line Pilots Association ("ALPA") pursuant to the Board's opinion attached to that order. At page 31 of the mimeographed copy of the opinion, the Board expressly stated that the parties would be free to petition the Board for such additional directives as may be required in connection with these negotiations. This petition is submitted pursuant to that permission.

1. Under date of July 31, 1962, Erie Phillips, Esq., of the law firm of Fisher & Phillips, Pryor Building, 26 Pryor Street, N.E., Atlanta 3, Georgia, labor attorneys for Southern, submitted in letter form to the Board a request for clarification of the Board's opinion accompanying Order E-18560. A copy of Mr. Phillips' letter of July 31, 1962 to the Board was sent to Mr. Clarence Sayen, Air Line Pilots Association, 55th Street and Cicero Avenue, Chicago 38, Illinois, together with a letter of transmittal which is attached hereto as Exhibit A. By letter dated August 8, 1962, Mrs. Jane T. Mandell, Chief, Docket Section, Civil Aeronautics Board, advised Mr. Phillips that his letter of July 31, 1962, failed to meet the requirements of Rule 302.4 of the Board's Rules of Practice. This petition places in the form

required by Rule 302.4 the contents of Mr. Phillips' letter of July 31, 1962, and does so without substantive change in said letter.

2. As evidenced by a letter from Mr. Leverett Edwards, Chairman, Mediation Board, Washington, D.C., dated July 23, 1962, to each member of the Board, Southern is in the process of complying with Order E-18560 of the Board subject to judicial review of the Board order.

3. At page 32 of the Opinion accompanying the Board's Order E-18560 the following statement is made:

"Under these principles, Southern would be permitted to retain as permanent employees those replacement pilots hired prior to July 12, 1960; strikers replaced on or after July 12, 1960, would be entitled to reinstatement if they desire and so request, and if necessary, Southern would be required to furlough or dismiss replacement pilots hired on or after July 12, 1960, to make room for them; and the seniority and other rights and privileges of the strikers should continue unimpaired."

In a meeting between a representative of A.L.P.A. and Southern, it became apparent that there is a disagreement as to the meaning and interpretation of this portion of the Board's order.

4. To illustrate the disagreement between the parties concerning the meaning and interpretation of the Board's order, it should be noted that on July 12, 1960, Southern had employed thirty pilots as captains. Thus, thirty captain-strikers had been replaced. It is Southern's contention that in achieving compliance with the Board's order, thirty replacement pilots would replace the thirty most junior captains among the strikers. The thirty captain-strikers would fall in the seniority list immediately after the thirty replacements. It is the contention of A.L.P.A. that the replacement pilots hired or flying as captain on July 12, 1960, must go to the bottom of the combined seniority list of captain and co-pilot strikers.

5. A comparable problem exists with respect to co-pilots in that on July 12, 1960, Southern had employed twenty-two

[2663]

co-pilots. It is Southern's position that these twenty-two pilots replaced the twenty-two pilots on the bottom of the co-pilot's (strikers) seniority list (excluding those employees who had not completed the probationary period). A.L.P.A. takes the contrary position insisting that all strikers must be reinstated with any replacements, irrespective of the date on which hired, going to the bottom of the seniority list.

6. A second point on which the C.A.B. opinion requires clarification involves forty-six pilots who were probationary pilots at the time of the strike. Included in this number were five pilots in ground school training at the time of the strike who have never flown for Southern. It should be noted that Section 31(c)(2) of the agreement between A.L.P.A. and Southern dated July 25, 1958, provided:

"Nothing in this Agreement shall extend the right of investigation and hearing to a co-pilot during his probationary period as stipulated in Section 23."

Southern's position is that the probationary pilots should take a position on the seniority list following replacement pilots having longer length of service than the probationary pilots. A.L.P.A. disagrees with this position. Southern's legal position for its position is based upon one of the cases cited by the Board on pages 31-32 of its order. This case is N.L.R.B. v. Pecheur Lozenge Co., 209 F. 2d 393, cert. den. 347 U.S. 953. Additional authority may be found in DeSoto Hardwood Flooring Co., 96 N.L.R.B. 382 and Crowley's Milk Co., 88 N.L.R.B. 1049.

7. Concerning seniority, it should be noted that Southern did not intend during negotiations (nor does it now), to affect the seniority of strikers in any way other than in determining the question of who flies as captain and who flies as co-pilot. In other words, Southern had no intention of affecting strikers' seniority rights with respect to vacations, pensions,



[2664]

203-A

[2664]

base pay, etc., although obviously Southern's position was and is that no seniority rights would accrue while a pilot was on strike.

WHEREFORE, Southern requests the Board to clarify its order, more particularly, as set forth above.

Respectfully submitted,

/s/ William S. Magill, Jr.
Vice President - Operations
Southern Airways, Inc.
Atlanta Airport
Atlanta, Georgia

/s/ Cecil A. Beasley, Jr.
912 American Security Building
Washington 5, D.C.
Attorney for Southern Airways, Inc.

August 14, 1962

Communications with respect to this document should be sent to:

Erle Phillips, Esq.
Fisher & Phillips
Pryor Building
26 Pryor Street, N.E.
Atlanta 3, Georgia

and

Cecil A. Beasley, Jr., Esq.
912 American Security Building
Washington 5, D.C.

Attorneys for Southern Airways, Inc.

[2666]

204

[2666]

Exhibit A
Page 1

Law Offices
FISHER & PHILLIPS
Pryor Building
26 Pryor Street, N.E.
Atlanta 3, Georgia

July 31, 1962

Mr. Clarence Sayen
Air Line Pilots Association
55th Street & Cicero Avenue
Chicago 38, Illinois

Dear Mr. Sayen:

As you know, Southern Airways, Inc. and A.L.P.A. resumed collective bargaining in Washington on Monday, July 16, 1962. As I then advised you, it is the intention of Southern Airways, Inc. to comply with Order E-18560, adopted on July 5, 1962, by the Civil Aeronautics Board.

One of the findings of the Board was that "Southern's demand relating to non-reviewable disciplinary action is illegal per se because it would deprive employees of their statutory rights to have their grievances adjusted in accordance with procedures established pursuant to Section 204 of the Railway Labor Act, and constitutes improper coercion and an unwarranted interference with protected rights of employees".

While Southern does not agree that it made a demand for the right to take non-reviewable disciplinary action, and while Southern's legal position is that such a demand, had it been made, was not illegal, to demonstrate its good faith in attempting to comply with the requirements of the C.A.B. in its Order E-18560, this is to advise you formally that Southern does not insist on the right to take non-reviewable disciplinary action insofar as any strikers are concerned.

As you know, we have not been able to agree on the issue of seniority, and we do not agree on the interpretation which should be given to that portion of the Board's Order E-18560 dealing with seniority.

[2669]

205

The Board in its order indicated that "the parties will be free to petition the Board for such additional directives as may be required".

Accordingly, I am enclosing a copy of a letter to the

[2667]

Exhibit A
Page 2

members of the Civil Aeronautics Board requesting a clarification of Order E-18560. I will mail this letter on August 2, 1962. You can, of course, take similar action.

Sincerely,
Erle Phillips

EP MS
Enc.

Via Air Mail

CC: Mr. Alan S. Boyd
Mr. Robert T. Murphy
Mr. Whitney Gilliland
Mr. G. Joseph Minetti
Mr. Chan Gurney
Mr. Leverett Edwards
Mr. Frank Hulse

[2669]

[Received Docket Section Aug. 20 12:36 PM '62, CAB]

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

In the Matter of the Enforcement Proceeding)
AIR LINE PILOTS ASSOCIATION) Docket No. 11654
v.)
SOUTHERN AIRWAYS, INC.)

REPLY TO PETITION FOR DIRECTIVE

and

PETITION FOR ORDER DIRECTING COMPLIANCE
BY AIR LINE PILOTS ASSOCIATION, INTERNATIONALCommunications with respect to
this document should be sent to:Henry Weiss, Esq.
50 East 42nd Street
New York, New York

and

James L. Highsaw, Jr., Esq.
620 Tower Building
Washington 5, D.C.Attorneys for
Air Line Pilots
Association, International

Dated: August 16, 1962

[2678]

Order No. E-18737

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.Adopted by the Civil Aeronautics Board at
its office in Washington, D.C., on the
27th day of August, 1962

In the matter of the

AIR LINE PILOTS ASSOCIATION
v. SOUTHERN AIRWAYS, INC.

Docket 11654

Enforcement Proceeding.

ORDER

By Order E-18560, adopted on July 5, 1962, the Board directed Southern Airways, Inc. (Southern), to bargain collectively in good faith with the Air Line Pilots Association, International (ALPA), as required by Section 2, First, of the Railway Labor Act and in accordance with

the Board's opinion. By petition filed August 14, 1962, Southern requests the Board to clarify its opinion and order in certain respects. On August 20, 1962, ALPA filed a reply to Southern's petition and a request that the Board direct Southern to effect immediate compliance with Order E-18560.

In its petition, Southern states that in the course of the negotiations which have been resumed between Southern and ALPA, pursuant to the Board's order, a disagreement between it and ALPA has arisen concerning the meaning and interpretation of the following portion of the Board's opinion:^{1/}

" . . . With regard to the difficult problem of job retention rights of replacement pilots in relation to the returning ALPA pilots, judicial decisions dealing with these matters have established guiding principles based upon considerations which are inherently just and equitable. [Citations omitted] Under these principles Southern would be permitted to retain as permanent employees those replacement pilots hired prior to July 12, 1960; strikers replaced on or after July 12, 1960, would be entitled to reinstatement if they desire and so request

^{1/} Portion quoted appears on pp. 31-32 of mimeographed decision.

and if necessary, Southern would be required to furlough or dismiss replacement pilots hired on or after July 12, 1960, to make room for them; and the seniority and other rights and privileges of the strikers should continue unimpaired."

The problems raised by Southern in its petition pertain to the seniority rights of the replacement pilots employed by Southern during the period June 5, 1960, to July 12, 1960, who under the terms of the Board's opinion and order may be retained as permanent employees of

Southern, vis a vis the seniority rights of striking pilots who will be reinstated by Southern upon settlement of the dispute. Southern contends, for example, that the 30 replacement pilots employed as captains during this period should be placed on the seniority list^{2/} above the 30 most junior reinstated captains, and above all reinstated co-pilots. For another example, Southern contends that the 22 replacement pilots employed as co-pilots during this period should be placed on the seniority list above the 22 most junior reinstated co-pilots, and above 46 striking pilots who were still in a probationary status at the time of the strike. As to the latter, Southern contends that replacement pilots who now have longer actual service with Southern than the probationary pilots should be placed on the seniority list above the reinstated probationary pilots.

ALPA, on the other hand, contends that application of the principle stated by the Board, that "the seniority and other rights and privileges of the strikers should continue unimpaired," requires that all retained replacement pilots be placed on the seniority list below those striking pilots who are reinstated by Southern upon settlement of the strike. It is clear, ALPA states in effect, that if upon reinstatement, a striking pilot were to be placed lower on the seniority list than a replacement pilot, his seniority would thereby be impaired, contrary to the Board's order.

Upon consideration of Southern's petition, including the cases cited therein, the Board has determined that under its decision of July 5, 1962, Order E-18560, all strikers reinstated by Southern upon settlement of the strike, whether such reinstated pilots were captains or co-pilots or probationary pilots at the time of the strike, are entitled to their respective places on the seniority list, ahead of all the replacement pilots retained by Southern. We think this should be apparent from those portions of our opinion devoted to the matter of superseniority, including the portion quoted above, in which it is specifically stated that the seniority of reinstated strikers is to be

unimpaired. At no point in our opinion is it suggested that replacement pilots retained by Southern may be vested with seniority superior to that possessed by the reinstated strikers. It is true that our

2/ The labor contract between Southern and ALPA provides for the maintenance and posting on bulletin boards of a Pilots System Seniority List, to be used by the Company in dealing with the seniority of pilots.

[2680]

opinion and order, under principles of settled case law, does permit Southern to retain as permanent employees those replacement pilots hired prior to July 12, 1960. As against those strikers who are not reinstated, the replacement pilots thus enjoy superior rights. The question before us now is not one of job tenure, but rather whether Southern may vest the replacement pilots with seniority superior to that of the reinstated pilots, with respect to such important seniority purposes as determination of assignments and bidding rights.^{3/} Assignments, of course, bear directly on compensation, and bidding rights bear directly on other important matters also, such as equipment and station. The answer we must give, for reasons of unreasonable discrimination set forth at length in our opinion, is clearly in the negative.

As we understand Southern's rationale, it is based on the premise that captains, co-pilots and probationary pilots should be deemed to constitute separate classes of employees. Thus, Southern relates captain replacements to captain strikers, co-pilot replacements to co-pilot strikers, and co-pilot replacements over and above probationary pilot strikers. We find no showing by Southern in support of this premise. To the contrary, we note that under the Railway Labor Act, all pilots are treated as constituting a single class or craft of employees. Further, the Southern-ALPA labor contract makes provision for only a single Pilots System Seniority List, and Southern does not allege that there are separate lists for captains, co-pilots, and probationary pilots. In these circumstances, we must reject Southern's claim.

ALPA requests that the Board direct Southern to effect immediate compliance with its order and further requests that the Board take such implementing action as it deems appropriate. ALPA, however, has submitted no information indicating that further action on our part is necessary at this time.

ACCORDINGLY, IT IS ORDERED:

1. That Southern be guided in its future negotiations with ALPA, pursuant to Order E-18560, adopted July 5, 1962, by the determination stated above;
2. That ALPA's petition for an order directing compliance with Order E-18560 be denied, except to the extent above granted; and
3. That the Board continue to retain jurisdiction over this proceeding until further notice for the purpose of assuring compliance by Southern with the Board's order.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON

Secretary

(SEAL)

MEMBERS GURNEY AND GILLILLAND DID NOT PARTICIPATE IN THE MAJORITY'S INTERPRETATION.

3/ We note Southern's statement in its petition "that Southern did not intend during negotiations (nor does it now), to affect the seniority of strikers in any way other than in determining the question of who flies as captain and who flies as co-pilot. In other words, Southern had no intention of affecting strikers' seniority rights with respect to vacations, pensions, base pay, etc. . . ."

[2685]

[Received Docket Section Oct. 29 10:13 AM '62 CAB]

BEFORE THE
CIVIL AERONAUTICS BOARD
Washington, D.C.

In the Matter of)

AIR LINE PILOTS ASSOCIATION) Docket No. 11654
v.SOUTHERN AIRWAYS, INC.)

PETITION FOR INTERVENTION, REHEARING
AND RECONSIDERATION

ARMOUR, HERRICK, KNEIPPLE & ALLEN
1001 Fifteenth Street, N.W.
Washington 5, D.C.

Attorneys for Petitioners

[2686]

BEFORE THE
CIVIL AERONAUTICS BOARD
Washington, D.C.

In the Matter of)

AIR LINE PILOTS ASSOCIATION) Docket No. 11685
v. SOUTHERN AIRWAYS, INC.)

PETITION FOR INTERVENTION, REHEARING
AND RECONSIDERATION

Pursuant to Rules 15 and 37, petitioners move the Board (1) to permit them to intervene in this proceeding, (2) to set this matter down for rehearing of evidence to be offered by petitioners, and (3) to reconsider its orders of July 5 and August 27, 1962 so as to give due recognition to the rights of these petitioners.

* * * * *

[2687]

212

[2687]

Grounds of Petition

1. ALPA failed to represent the interests of the petitioners, although it was under a legal obligation to do so.
2. The individual petitioners will be unjustifiably discharged or downgraded or otherwise irreparably injured in consequence of the Board's orders unless these orders are rescinded or modified.
3. The petitioners were never served with the Board's orders, but are now advised of them and of some of the actions that have been taken and are about to be taken under them, and are prepared, on a rehearing, to establish by evidence the illegality and the injustice as applied to the petitioners of the orders of the Board and of the actions of Southern and ALPA thereunder.

* * * * *

[2703]

BEFORE THE
CIVIL AERONAUTICS BOARD

DOCKET NO. 11654

AIR LINE PILOTS ASSOCIATION v. SOUTHERN AIRWAYS, INC.
ENFORCEMENT PROCEEDING

ANSWER OF
AIR LINE PILOTS ASSOCIATION INTERNATIONAL TO PETITION
OF SOUTHERN AIRWAYS PILOTS ASSOCIATION ET AL FOR
INTERVENTION, REHEARING AND RECONSIDERATION

* * * * *

[2715]

III

The Grand Of The Petition
Would Be Contrary To The
Public Interest.

* * * * *

The record in this proceeding shows that the strike has resulted in a multiplicity of litigation involving Southern, individual pilots and ALPA. The strike had also resulted in claims, which are part of this record, by both parties with respect to threats and violence. The effect of the unsettled dispute upon the public interest and upon the air transport industry had become so great that during the fall of 1961 and the early part of 1962, Dr. Nathan P. Feinsinger, appointed by the President to investigate various airline labor disputes, was requested by the then Secretary of Labor to conduct an investigation into the ALPA-Southern dispute. Such an investigation was conducted and resulted in extensive hearings before Dr. Feinsinger involving Southern, ALPA and the Board. The Board orders which the petitioners seek to have reconsidered put an end to this dispute by setting forth guidelines

[2716]

for its settlement and by directing that Southern and ALPA renew their long dormant negotiations under the Railway Labor Act. * * *

* * * * *

[2720]

[Received Docket Section Nov. 23 10:23 AM '62 CAB]

BEFORE THE
CIVIL AERONAUTICS BOARD
Washington, D.C.

In the Matter of

AIR LINE PILOTS ASSOCIATION) Docket No. 11654
v. SOUTHERN AIRWAYS, INC.)

MOTION FOR LEAVE TO FILE REPLY

and

PETITIONERS' REPLY TO ANSWER
OF AIR LINE PILOTS ASSOCIATION

ARMOUR, HERRICK, KNEIPPLE & ALLEN
1001 Fifteenth Street, N.W.
Washington 5, D.C.

Attorneys for Petitioners

[2724]

* * * * *

ALPA filed a formal complaint with CAB on July 22, 1960 alleging that Southern failed to bargain in good faith, thereby disregarding its obligation under the Railway Labor Act, as amended, which is made a condition to the enjoyment of its certificate under Section 401(k) (4) of the Federal Aviation Act. On September 26, 1960 the Director, Bureau of Enforcement, instituted enforcement proceedings against Southern, and a hearing was held before Examiner Cusick on December 1, 1960 to January 18, 1961. The petitioners were not aware of these proceedings until some time shortly after September 22, 1961, when the initial decision rendered on that date was given publicity in a local newspaper. This publicity did not recite any facts stating that the

petitioners' employment rights were in issue. The notices published in the Federal Register (see ALPA's Answer, pp 2-3) were equally uninformative. It was not until May 1962, when the tentative decision by the CAB was issued, that the petitioners were made aware that their job rights were being considered in the CAB proceeding.

Moreover, petitioners were lulled into a false sense of security by assurances and statements on the part of Southern that they would never be replaced.

On July 12, 1960, Southern notified its replacement pilots as follows:

[2725]

"A major new problem area which has arisen since the beginning of the current pilots strike on June 5, 1960 was pointed up today when the striking pilot group in effect requested as a condition of settlement that Southern dismiss all of the pilots who have been hired as replacements.

Southern cannot and will not abandon this new group of well qualified employees who have accepted permanent employment with Southern at a time when they were badly needed to help fulfill our obligation to the traveling public."

In an Offering Circular on November 4, 1961 offering subscription to "Subordinated Convertible Debentures," Southern made the following statement:

"As of October 1, 1960, the Company employed 818 persons.

On June 5, 1960, the Air Lines Pilots Association International, which represented the pilots and co-pilots flying for the Company, called a strike against the Company. This strike is still in progress, but the Company has permanently replaced, since June 5, 1960, all of the pilots on strike and is now operating all of the route mileage which it operated prior to the strike. The Company has a contract with the Air Line Dispatchers Association."

(Emphasis added.)

Again on May 12, 1962, Southern's Vice President--Operations, in commenting on the Board's Tentative Decision, had this to say to the replacement pilots:

"You have no doubt heard by this time that the Board gave out a press release today announcing they intended to issue a decision in our dispute with ALPA. Further, that this would find Southern to have taken improper positions on the seniority and discipline questions on July 12, 1960.

The Board's tentative decision said that Southern would be required to negotiate with ALPA and restore those strikers who had not been replaced on July 12th. Also that those returned would not have their seniority impaired.

We are quite disappointed with this decision, however, we have the right to appeal to the Board, besides taking the case to court. It is our feeling that this is just one more milepost on our lengthy road and considerable time remains before the score is totalled.

Your company has overcome serious obstacles before and fully intends to continue its good performance with your help."

[2726]

Numerous other instances of assurances by Southern to its replacement pilots occurred. The individual petitioners are prepared to testify that they were employed as permanent replacements -- a fact repeatedly re-affirmed by Southern. On many occasions Southern advised the replacement pilots that it would protect their interests, that there was no necessity or occasion for them to have counsel or to form a labor organization. Southern discouraged them from seeking participation or representation in the proceeding before the Board, or in applying to the National Mediation Board for an investigation and election of representatives under the Railway Labor Act. After the Board's decision of July 5, 1962, some of the present petitioners

asked Southern for permission to participate in or be present as observers in such negotiations. Southern refused this request. It was not until after the alleged agreement of September 21, 1962 had been signed that the petitioners learned that they would not be retained permanently.

Petitioners then acted promptly. Within approximately one month, they had formed and designated Southern Pilots Association as their collective bargaining representative under the Railway Labor Act, had (through the Association) applied to the National Mediation Board for investigation of the dispute as to representation, had retained counsel, had petitioned the United States Court of Appeals for the District of Columbia for a review of the Board's orders, had filed this Petition with the Board, and had instituted an action in the United States District Court, Northern District of Georgia, requesting an order enjoining Southern and ALPA from making the alleged agreement of September 24, 1962 effective.

* * * * *

[2747]

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LEWIS H. HOLMAN, et al)
Plaintiffs) CIVIL ACTION
vs.) NO. 8131
SOUTHERN AIRWAYS, INC., and)
AIRLINE PILOTS ASSOCIATION,)
Defendants)

* * * * *

[2753]

It seems to the Court that it is unlikely that there could have been any misapprehension on the part of the plaintiffs concerning the open obligation of the Airline Pilots Association to rectify what the Civil Aeronautics Board had found to be the unlawful demands of Southern Airways, Inc., concerning seniority forfeiture, super-seniority and non-reviewable discipline. Nevertheless, the plaintiffs did nothing in this period to assert their legal rights now claimed in any of these proceedings, judicial or administrative. Now that the parties have, in conformity with the Board's order, come to an agreement and are in the process of re-training pilots who have been out of service for upwards of two years, the plaintiffs, for the first time, come forward and enlist, at this late date, the aid of the Court to enjoin the action to be taken under the agreement of September 21, 1962.

* * * * *

[2754]

* * * * *

The plaintiffs could have proceeded under 49 U.S.C.A., Sec. 1486(d), to secure interlocutory relief by giving the Civil Aeronautics Board five days' notice. Instead, they chose to seek injunctive relief in this Court, this petition being only one of several avenues of approach which the plaintiffs have utilized

[2755]

to secure their desired ends. The extreme seriousness and importance of these proceedings are well recognized by this Court, and it is extremely sympathetic to the plight of those pilots against whom the order of the Civil Aeronautics Board has been directed. However, in the face of the expressed intention of the Congress to vest exclusive jurisdiction in the various Courts of Appeals to review orders of the

Civil Aeronautics Board, this Court feels that any relief, injunctive or otherwise, must be had either from such Courts of Appeals or from the administrative agency in whose jurisdiction the proceedings originated--in this case, the Civil Aeronautics Board.

Accordingly, the petition for a preliminary injunction is hereby denied, the motion to dismiss filed by the defendants is granted, and the temporary restraining order heretofore entered is dissolved.

IT IS SO ORDERED.

This the 9th day of November, 1962.

/s/ Lewis R. Morgan
United States District Judge

[2756]

EXHIBIT B

BACK TO WORK AGREEMENT
MEMORANDUM OF AGREEMENT
SOUTHERN AIRWAYS, INC.

with

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

WHEREAS, the Civil Aeronautics Board, in Docket No. 11654, made its order No. E-18560 on July 5, 1962 and its further order No. E-18737 on August 27, 1962, and

WHEREAS, the Civil Aeronautics Board retained jurisdiction over such proceedings for the purpose of assuring compliance with its orders, and

WHEREAS, it is the desire of Southern Airways, Inc. and the Air Line Pilots Association, International to comply with and implement said orders of the Civil Aeronautics Board,

NOW, THEREFORE, it is AGREED by and between Southern Airways, Inc. and Air Line Pilots Association, International as follows:

1. RESTORATION TO ACTIVE FLYING STATUS

A. The Company agrees, as of the effective date of this Memorandum, to use its best efforts to return expeditiously to active flying status all pilots in the employ of the Company on June 4, 1960, as shown on the list annexed hereto as Attachment A. Such pilots shall in any event be restored to base pay and minimum guarantee status and shall commence to receive such pay not later than 180 days following the effective date of this Memorandum.

B. The Company and the Association shall jointly establish a Joint Flying Committee of six members, three to be designated by the Company and three by the Association. Such Committee shall consider and work out the details for the purpose of expediting the resumption of flying service as set forth in paragraph "1.A." above. Such Committee shall schedule pilots in such a way as to economically and rapidly restore all pilots to active flying status. Schedules or programs developed by the Committee shall be deemed to be a part of this Agreement within the provisions hereof. This Committee shall be established within five days following the effective date of this Memorandum. It shall hold meetings at least once each week and more often if necessary at Atlanta, Georgia or such other places on the Company's system as the Committee may agree upon. The Committee shall continue to function during the effective period of this Memorandum of Agreement.

C. No pilot shall in any manner be discriminated against as a result of his participation in the withdrawal from service on June 5, 1960 or any acts relating thereto. The employment of such pilots, their seniority and all conditions of employment as of June 5, 1960, the time of said withdrawal from service, shall be unimpaired and shall continue in effect in the same manner to the same extent as though said withdrawal from service had not occurred, unless otherwise provided herein.

* * * *

2. SENIORITY

A. Attachment "A" is hereby established for all purposes as the Pilots System Seniority List within the meaning of Section 20 of the Employment Agreement. There being pilot positions available to place in active service all pilots on Attachment "A" and all pilots now in the employ of the Company who were hired between June 5, 1960 and July 12, 1960, accordingly all pilots hired by the Company between June 5, 1960 and July 12, 1960 and who are in the active employ of the Company at the time when the pilots listed on Attachment "A" are fully returned to active flying status as provided for in this Memorandum of Agreement shall be added to the bottom of said Attachment "A". Pilots hired by the Company after June 5, 1960 to date hereof are shown with dates of hire on the list annexed hereto as Attachment "C". Pilots employed subsequent to July 12, 1960 and who are in the active employ of the Company at the time when the pilots listed on Attachment "A" are fully returned to active flying status as provided in this Memorandum of Agreement shall be added (following those hired between June 5, 1960 and July 12, 1960) to the bottom of Attachment "A" in the order of hiring. Attachment "A" with such added names at the bottom thereof shall together constitute the Pilots System Seniority List. The remainder of such pilots hired after July 12, 1960 will be placed on a preferential hiring list to be established by the Company, and such pilots will not be employed until and unless they are needed by the Company to satisfy the pilot needs of the Company and are placed on active payroll flying status, at which time they shall be placed on the Pilot System Seniority List. Except as otherwise may be provided in this Memorandum of Agreement all pilots shall be restored to and continue in active flying status in accordance with such Pilots System Seniority List. As provided in Section 20 of the Employment Agreement all furloughs shall be in reverse order of seniority.

B. In respect to the pilot employees as shown on Attachment "A", seniority for pay and all other purposes except as otherwise provided herein shall, in addition to the seniority accrued prior to June 5, 1960, be deemed to have accrued for the period June 5, 1960 to the date of this Memorandum, and thereafter in accordance with the terms of the Employment Agreement. All of said pilot employees listed on Attachment "A" who were, on June 4, 1960, on probationary status shall be deemed to have fulfilled and passed said probationary period.

C. Any pilot shown on Attachment "A" who on the effective date of this Memorandum is in military service or on military leave shall automatically be granted a furlough by the Company until a maximum of ninety (90) days after it is possible for him to receive a release or discharge from such military service, and his return to duty shall be under the provisions of Section 24 (f) of the Employment Agreement and the provisions of this Memorandum of Agreement shall be effective in his behalf.

D. Except as provided in paragraph "2.C." of this Memorandum, any pilot listed on Attachment "A" shall have forty-five (45) days in which to report for duty. Such forty-five (45) days shall be calculated from the date on which the Company receives the registered return receipt of the recall notice from such pilot, provided, however, that in the instance of physical disability the pilot shall be deemed to be on sick leave and the provisions of Section 24 (b) of the Employment Agreement shall apply.

* * * * *

9. WITHDRAWAL OF CAUSES OF ACTION OR CLAIMS

A. Southern and ALPA agree that all complaints and causes of action in law or in equity, or otherwise, brought by either of them against the other or their officers, representatives or members, and

any orders issued as a result thereof by any tribunal, of any kind or character, shall be withdrawn, dissolved, or dismissed without cost to either parties, and the parties hereto agree upon the request of either party, to execute mutual releases of any and all such claims as they may have against each other or their officers, representatives or members, and also to execute any further instruments necessary to effectuate this purpose. The foregoing does not include proceedings before the Civil Aeronautics Board in Docket No. 11654. Southern and ALPA agree to withdraw their respective petitions to review the determination and orders of the Civil Aeronautics Board in said proceeding.

B. ALPA agrees to make no claim against Southern for loss of pay consequent upon the stoppage of work, and it shall be a condition of reinstatement of each pilot that he shall execute a release, a copy of which is attached to this Memorandum as Attachment "D" and made a part hereof, in favor of the Company for any such claim.

* * * * *

[2779]

Order No. E-19162

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board at
its office in Washington, D.C., on the
3rd day of January, 1963

In the matter of	}	
AIR LINE PILOTS ASSOCIATION	}	
v.	}	Docket 11654
SOUTHERN AIRWAYS, INC.,	}	
<u>Enforcement Proceeding</u>)	

**ORDER DISMISSING PETITION FOR
INTERVENTION, REHEARING, AND RECONSIDERATION**

By Order E-18560, entered herein on July 5, 1962, the Board directed Southern Airways, Inc. (Southern) and the Air Line Pilots Association (ALPA), the legally designated collective bargaining agent for Southern's pilots, to resume their previously terminated contract negotiations. While the order contained certain principles which the Board stated should be observed in the future negotiations,^{1/} it also stated that the parties were not precluded from reaching an agreement different therefrom. On September 21, 1962, the parties entered into a contract terminating their long-standing labor dispute.

By petition filed October 29, 1962, certain replacement pilots hired by Southern during the course of its labor dispute with ALPA and their recently formed association (Southern Airways Pilots Association) seek leave to intervene herein, request that the proceeding be reopened to allow the presentation of evidence and argument by them, and that Board Orders E-18560 and E-18737 be suspended and reconsidered. In support of the petition it is urged that (1) petitioners were necessary and indispensable parties to the proceeding and were never served with copies of the Board's orders; (2) they were not represented in the

^{1/} At Southern's request, the Board issued an additional order (Order E-18737, dated August 27, 1962) which clarified some of these principles.

Board proceedings by ALPA, which they assert was under a legal obligation to do so, or by Southern, which had assured them it would protect their interests; (3) they had no knowledge of the Board proceedings until the fall of 1962, at which time they took this action, among others;^{2/} and (4) unless the Board grants them the relief they seek, they will suffer irreparable injury, including the loss of their livelihood or seniority rights.

ALPA, in its responsive pleadings, contends that petitioners were not necessary and indispensable parties under the Board's Rules of Practice (Part 302.210); petitioners had constructive notice of the Board's proceedings by virtue of publications in the Federal Register^{3/} and had actual knowledge of the Board's intention to issue Order E-18560 in May of 1962; and, therefore, their attempt to intervene in this proceeding or seek reconsideration of the Board's orders on October 29, 1962 is untimely, and they have failed to demonstrate good cause for the Board to permit the late filing.^{4/} Consequently, ALPA urges that the petition be dismissed.

While we are of the view that the petition is untimely under our rules and for that reason need not be entertained, we nonetheless have accepted for filing and have considered all the documents submitted by the parties,^{5/} and have concluded that there are additional considerations which require its dismissal. It is apparent from the

^{2/} In addition to filing the petition with the Board, the Southern Airways Pilots Association asserts it has applied to the National Mediation Board to determine whether it, rather than ALPA, should be designated the collective bargaining representative for Southern's pilots under the Railway Labor Act; has petitioned the United States Court of Appeals for the District of Columbia Circuit for a review of Board Orders E-18560 and E-18737; and has instituted an action in the United States District Court for the Northern District of Georgia seeking to enjoin Southern and ALPA from enforcing the agreement they entered into on September 21, 1962.

^{3/} See Notice of Hearing (25 F.R. 10372, October 28, 1960); Notice of Postponement of Hearing (25 F.R. 10667, November 15, 1960).

^{4/} ALPA also asserts that it was under no legal duty to represent the petitioners in the Board proceedings, and that Southern actually looked after their interests.

^{5/} These are: the instant petition; an answer therefo filed by ALPA on November 13, 1962; a motion for leave to file a reply and a reply to ALPA's answer, filed by Southern Airways Pilots Association on November 23, 1962; an answer to such motion and reply filed by ALPA on December 3, 1962; an opposition to this pleading filed by Southern Airways Pilots Association on December 6, 1962; and a motion, by way of letter, made by ALPA to strike this opposition, filed December 6, 1962.

[2781]

undisputed facts that Southern and ALPA resumed their negotiations and concluded a contract on September 21, 1962, which resolved their dispute. The Board retained jurisdiction in this proceeding to insure that the carrier discharged its duty to bargain in good faith, and not for the purpose of passing on the merits of any contract which the parties might ultimately negotiate. There is no showing of any lack of good faith bargaining, and any altering or vacating of the Board's order would not in any way affect the contract over which we lack jurisdiction. Consequently, there is no basis for further Board action in this proceeding.

Moreover, apart from these considerations, the Board's rules do not require that employees of air carriers which are the subject of complaints be made parties nor do established legal principles require that individual employees be made parties in labor controversies where there is a duly designated collective bargaining agent. It is unnecessary for the Board to determine whether it would have granted a timely application by petitioners for leave to intervene since none was filed.^{6/} Finally, and apart from the fact that there is no showing of any improper conduct by ALPA in this respect, the Board does not consider that it can look behind the National Mediation Board's designation of ALPA as the collective bargaining agent for Southern's pilots or inquire into whether the union had discriminated against petitioners in its representation functions.

ACCORDINGLY, IT IS ORDERED: That the petition for intervention, rehearing, and reconsideration filed on October 29, 1962, by the Southern Airways replacement pilots be and hereby is dismissed.

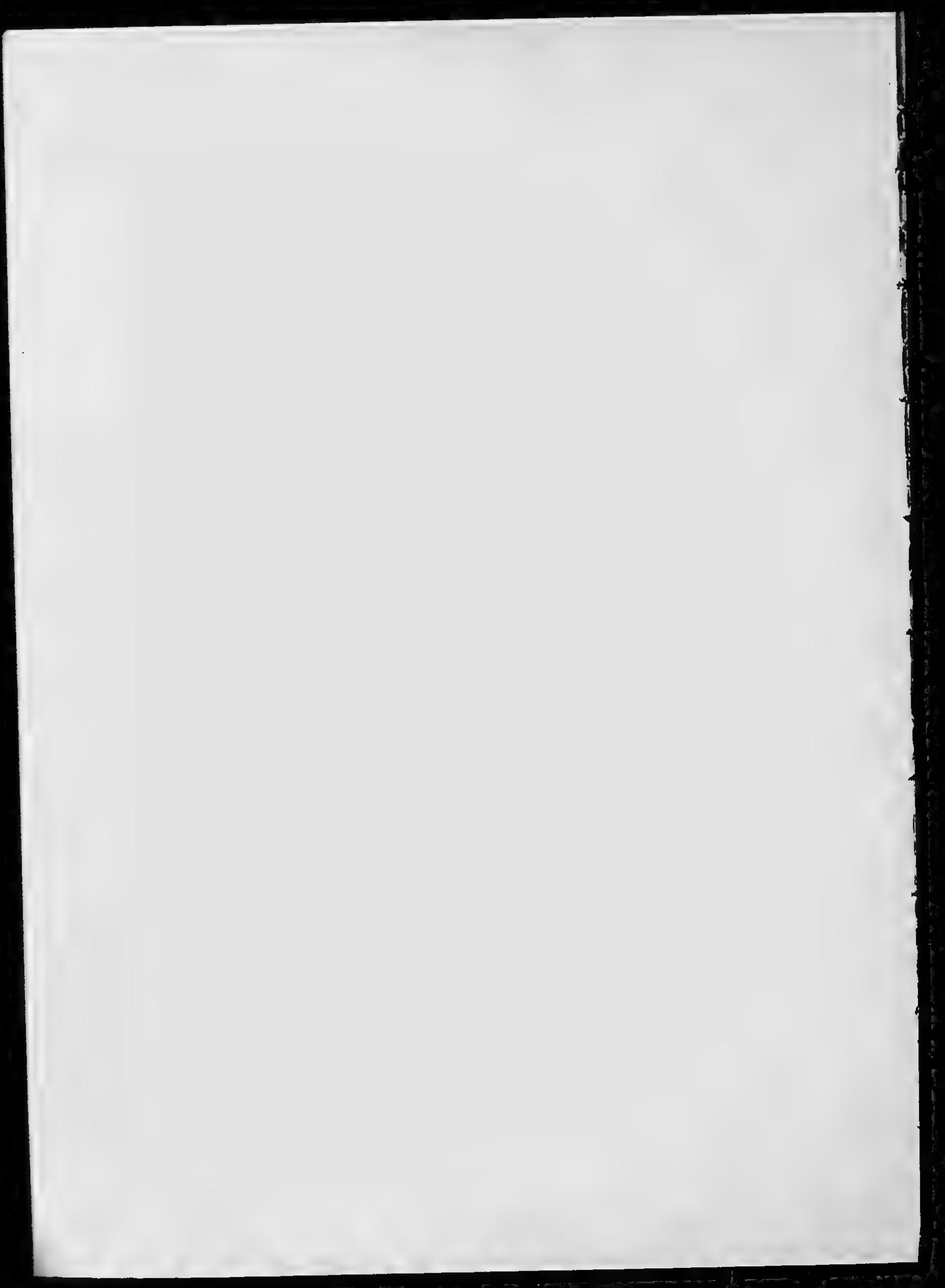
By the Civil Aeronautics Board:

HAROLD R. SANDERSON

Secretary

(SEAL)

6/ The Board need not determine whether petitioners had legal or actual notice of the enforcement proceeding. It should be noted, however, that petitioners concede they had actual notice of the Examiner's Initial Decision, but not all of his findings, shortly after September 22, 1961, as well as knowledge of our proposed decision in May 1962. Furthermore, in the action petitioners brought in the District Court for the Northern District of Georgia (Civil Action No. 8131), the Court found that petitioners were fully aware of our decision and of the fact that Southern and ALPA were resuming negotiations to resolve the labor dispute. The Court also found that Southern, by publications periodically distributed to its employees, including petitioners, gave full publicity to ALPA's complaint, the Board's decision to conduct hearings concerning such complaint, and to the actual conduct of such hearings. This opinion, together with the ALPA-Southern contract, is contained in the pleadings before us.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 25 1963

No. 17,362

Nathan J. Paulson
CLERK

SOUTHERN PILOTS ASSOCIATION,
LEWIS H. HOLMAN, et al.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

AIR LINE PILOTS ASSOCIATION,

Intervenor.

PETITION FOR REHEARING

Petitioners move for rehearing of the above-entitled cause, and as grounds therefor assign the following:

The Court dismissed the appeal as moot for the reason that a decision on the validity of the Civil Aeronautics Board's orders "would have no effect because the rights and duties of the parties are now controlled by the bargaining agreement subsequently entered into."



In this conclusion the Court is in error. The Board's orders do have and will continue to have an effect adverse to petitioners.

1. In Order No. E-18560, July 5, 1962, the Board ordered Southern Airways to "bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act" and in accordance with its opinion of that date. Section 2, First, of the Railway Labor Act (45 U.S.C. 151a) provides:

"It shall be the duty of all carriers . . . to make every reasonable effort to make and maintain [collective bargaining] agreements . . ."

Section 401(k)(4) of the Federal Aviation Act (49 U.S.C. 1371 (k)(4)) imposes upon air carriers the continuing obligation to bargain with their employees and requires continuing compliance as a condition for retention of the air carrier's certificate. Cf. Conley v. Gibson, 355 U.S. 41, 46 (1957), where the Supreme Court held that the bargaining duties of employee representatives under the Railway Labor Act continue after a collective agreement is reached. Thus it is Southern's duty, as required by the Board and by statute, to bargain collectively with ALPA and to make and maintain its collective bargaining agreements, including the provisions which the Board says must be incorporated, subject to the powerful sanction of losing its certificate, under § 401(g) of the Federal Aviation Act (49 U.S.C. 1371(g)).

2. The Board's order also provided that it retained jurisdiction "until further notice for the purpose of assuring compliance by Southern Airways, Inc. with this order." No such notice has ever been issued, and the Board has never found that its orders have been complied with. If, for instance, Southern Airways were now to violate the agreement, the Board might well hold it had violated the orders.

3. Order No. E-18737 of August 27, 1962 is similar to the earlier order, except as modified by determinations stated in it.



4. Petitioners have attacked the validity of the collective bargaining agreement in the Federal District Court in Georgia. The District Court dismissed the case on the ground that it constituted an attempted review of the Board orders which was beyond the jurisdiction of that court. Holman v. Southern Airways, Inc., 210 Fed. Supp. 407 (N.D. Ga., 1962, appeal pending). Thus the Federal Court in Georgia held that petitioners' attack on the collective bargaining agreement is barred by the petitioners' inability to reach the Board orders in that court. Yet this Court in the instant case holds that a decision by it on the validity of the Board orders would have no effect because the rights and duties of the parties are now controlled by the collective bargaining agreement. Thus petitioners are caught in a crossfire. They cannot attack the Board orders here because of the subsequent collective bargaining agreement; they cannot attack the bargaining agreement there because of the continuing vitality of the Board orders. There must be redress somewhere. If this Court were to reverse the Board, petitioners could then pursue their remedy in Georgia.

5. Should petitioners pursue their remedies against Southern Airways for breach of their employment contracts, or against ALPA for discrimination against them in the bargaining negotiations (for the validity of such suits, see Point III, page 15, of their brief in this case), they will undoubtedly be met by the defense of force majeure based on the Board orders. If these orders are invalid, this Court is the only court which can say so.

6. While petitioners were not formal parties to the proceedings before the Board, they do have the right to appeal the Board's orders (Federal Aviation Act, § 1006(a), 49 U.S.C. 1006(a)). This right cannot be destroyed by the unilateral action of the two formal parties. If it can be, the command of the statute relative to the parties who can appeal is effectively nullified.



7. Unless this Court treats this controversy as not moot and disposes of this appeal on its merits, the Board's orders will stand as an impediment to relief against the agreement which those orders have caused, notwithstanding the petitioners' challenge that the Board's orders unjustly discriminate against the petitioners, were issued in disregard of procedural due process, and unlawfully exceed the Board's lawful jurisdiction.

Petitioners request oral argument on this petition.

Respectfully submitted,

PHILIP F. HERRICK

NICHOLAS E. ALLEN

1001 - 15th Street, N. W.
Washington, D. C.

Of Counsel:

Attorneys for Petitioners

JOHN B. KNEIPPLE

CERTIFICATE UNDER RULE 26

I certify that the above petition is presented to the court in good faith and not for delay.

Philip F. Herrick



CERTIFICATE OF SERVICE

I hereby certify that I have on this 25th day of June, 1963, served two copies of the foregoing Petition for Rehearing upon O. D. Ozment, Esq., Associate General Counsel, Civil Aeronautics Board, 1825 Connecticut Avenue, N. W., Washington 25, D. C., and James L. Highsaw, Jr., Esq., 620 Tower Building, Washington 5, D. C., by causing them to be delivered to said addresses by messenger.

Philip F. Herrick

ANSWER OF AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL TO PETITION FOR REHEARING

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, LEWIS H. HOLMAN, ET AL.,
Petitioners,

v. No. 17,362

CIVIL AERONAUTICS BOARD, Respondent,
AIR LINE PILOTS ASSOCIATION, Intervenor.

On Petition for Review of Orders of the
Civil Aeronautics Board

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 3 1963

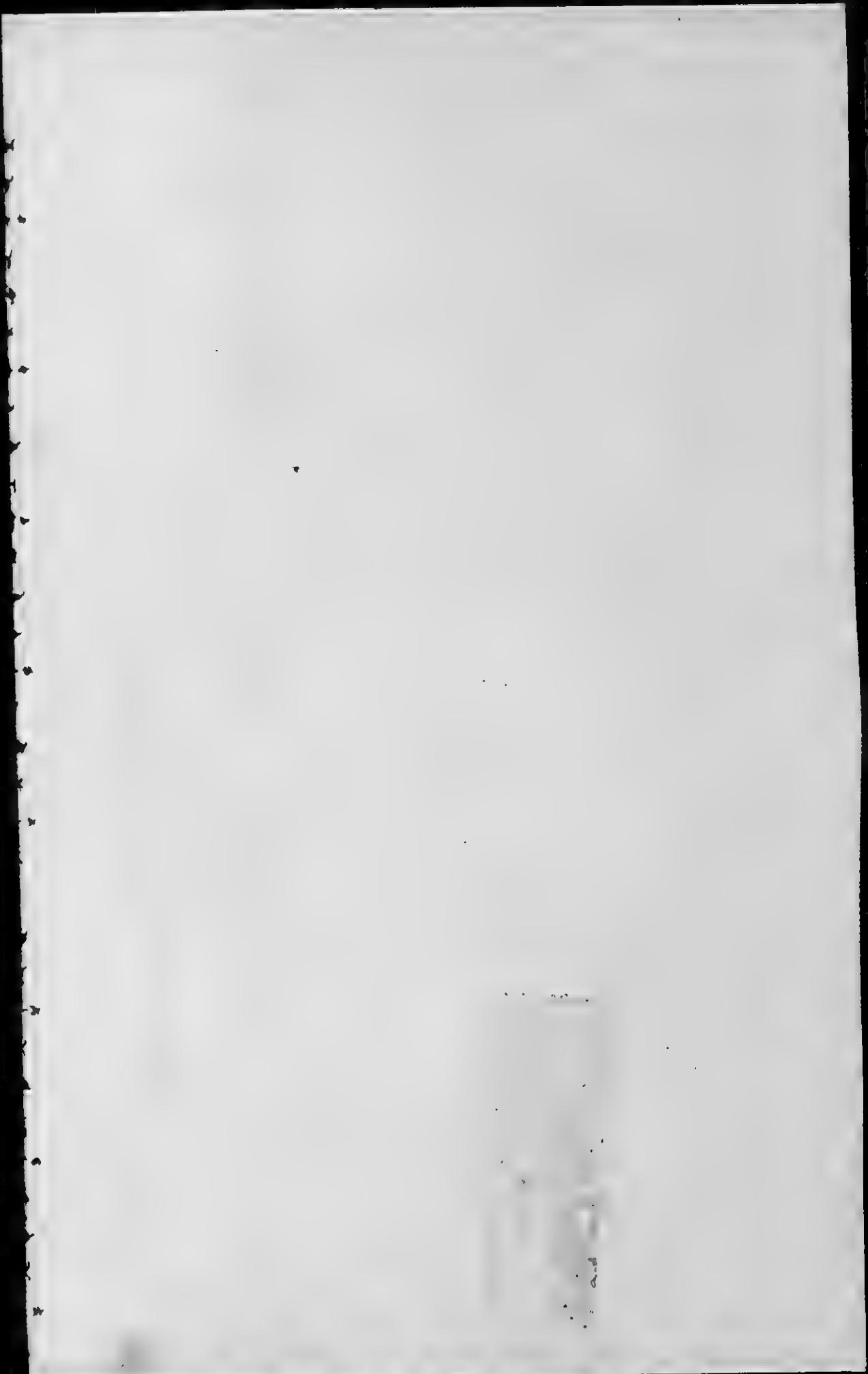
Nathan J. Paulson
CLERK
July 3, 1963

HENRY WEISS
HERBERT LEVY
605 Third Avenue
New York 16, New York

JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.

Attorneys for Intervenor
Air Line Pilots Association

PRINTED BY ERICK S. ADAMS, WASHINGTON, D. C.



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, LEWIS H. HOLMAN, ET AL.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent,*
AIR LINE PILOTS ASSOCIATION, *Intervenor.*

On Petition for Review of Orders of the
Civil Aeronautics Board

**ANSWER OF AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL TO PETITION FOR REHEARING**

Now comes the Air Line Pilots Association, International, an intervenor in the above-entitled case, to oppose the petition for rehearing of the Court's decision of June 13, 1963, filed by the petitioners Southern Pilots Association, et al.

The arguments set forth in the petition for rehearing essentially fall into two categories. First, there is the con-

tention that the orders of the Civil Aeronautics Board involved have a continuing effect and that the Board has reserved therein a continuing jurisdiction. This contention was set forth at pages 2 and 3 of the reply brief of petitioners and has already been considered by the Court. Second, it is argued that unless the Court disposes of the appeal on the merits the Board's orders will stand as an impediment to relief by the petitioners against the collective bargaining agreement of September 21, 1962, between the Air Line Pilots Association and the Southern Airways. This argument has also been previously made to the Court and was specifically considered and rejected at page 4 of the Court's decision dismissing the petition.

WHEREFORE, Air Line Pilots Association, International, prays that the petition for rehearing be denied.

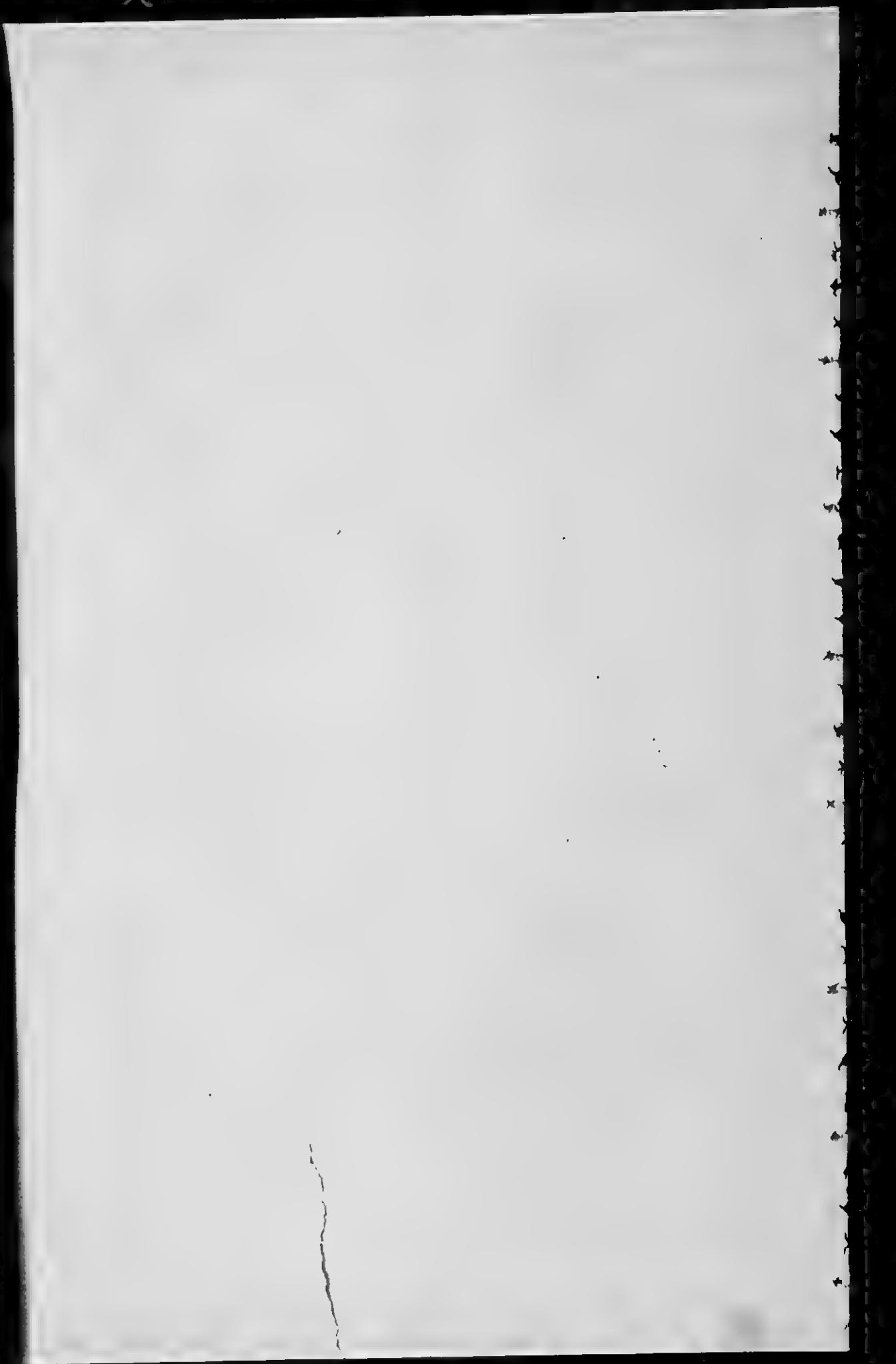
Respectfully submitted,

HENRY WEISS
HERBERT LEVY
605 Third Avenue
New York 16, New York

JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.

*Attorneys for Intervenor
Air Line Pilots Association*

July 3, 1963



ANSWER OF AIR LINE PILOTS ASSOCIATION
INTERNATIONAL
TO PETITION FOR REHEARING EN BANC

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, LEWIS H. HOLMAN, ET AL.,
Petitioners.

v.

CIVIL AERONAUTICS BOARD, Respondent,
AIR LINE PILOTS ASSOCIATION, Intervenor

On Petition for Review of Orders of the
Civil Aeronautics Board

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 5 1963

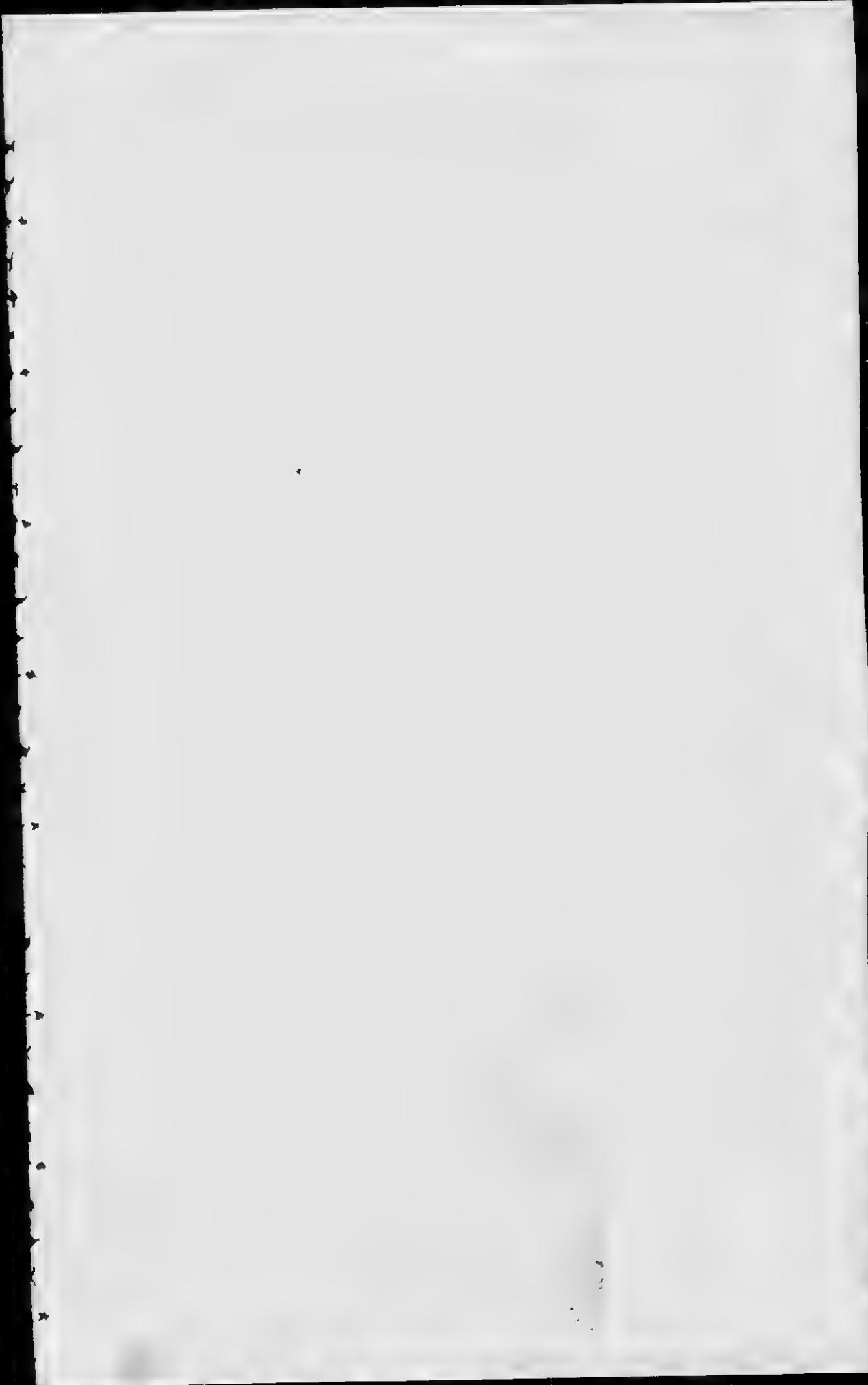
Nathan J. Paulson
CLERK

HENRY WEISS
HERBERT LEVY
605 Third Avenue
New York 16, New York

JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.
Attorneys for Intervenor
Air Line Pilots Association

August 5, 1963

Printed at EXPENSES OF ERICSON S. ADAMS, WASHINGTON, D. C.



IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, LEWIS H. HOLMAN, ET AL.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent,*
AIR LINE PILOTS ASSOCIATION, *Intervenor.*

On Petition for Review of Orders of the
Civil Aeronautics Board

**ANSWER OF AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL
TO PETITION FOR REHEARING EN BANC**

Now comes the Air Line Pilots Association, International, an intervenor in the above-entitled case, to oppose the petition for rehearing of the cause before the full Court sitting *en banc*, filed by petitioners Southern Pilots Association, et al., on July 30, 1963. This opposition is based upon the following grounds:

1. The arguments contained in the petition have been considered by this Court not once but twice. They were made to the Court in the original brief of the petitioners and were repeated in their petition for rehearing, denied by the Court on July 8, 1963.

2. The recent decision of the United States Supreme Court in *National Labor Relations Board v. Erie Resistor Corporation, et al.*, — U.S. —, 10 L. ed. 2d 308 (1963), entirely cuts the ground out from under the argument advanced by petitioners on the merits. The petitioners, in reliance upon the decisions in *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938), and *N.L.R.B. v. Potlatch Forests*, 189 F. 2d 82 (9th Cir., 1951), argued that the Board erred in holding that the insistence of Southern Airways on job retention and seniority rights for replacement pilots violated the Railway Labor Act. (Pet. Br., 21, 22.) The Supreme Court, in the recent *Erie Resistor* decision, affirmed the ruling of the National Labor Relations Board that an employer committed an unfair labor practice by extending seniority credit to strike replacements without regard to the motive of the employer in so doing. In its decision in this case, the Civil Aeronautics Board referred to the *Erie Resistor* case and concluded that the reasons advanced by the National Labor Relations Board were cogent. However, because the Third Circuit upon review had reversed the Labor Board on the grounds that the grant of such superseniority is not unlawful absent a showing of an illegal motive on the part of the employer (303 F. 2d 359) the Civil Aeronautics Board applied the principles of the *Potlatch* case and other earlier decisions and determined that the demand of Southern relating to seniority entailed unreasonable and unwarranted discrimination against the striking pilots, the effect of which was to discourage and interfere with protected employee activities. (Tr. 2575-2580.) Petitioners attacked this conclusion. On the basis of the *Erie Resistor* decision, the Board's decision was a correct one without its investigation of and

factual determination as to the employer's motivation. Thus, no useful purpose would be served by a further hearing in this case as requested by petitioners.

3. Petitioners also assert that there is a need for a rehearing *en banc* because the controversy involves at least one matter of great public importance, i.e. the Board's authority to regulate labor relations. Aside from the fact that petitioners at no time challenged the Board's jurisdiction before that agency and hence are precluded from raising this issue before this Court by Section 1006(e) of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1486(e)), petitioners' argument on the lack of Board jurisdiction is wholly without merit. The Federal Aviation Act of 1958 specifically makes it a condition of the holding of a certificate by an air carrier that such carrier comply with the provisions of the Railway Labor Act and confers authority upon the Board to enforce both the provisions of the aviation statute as well as the obligations of an air carrier certificate. (Sections 401(g) and (k)(4), 49 U.S.C.A., Sections 1371(g) and (k)(4).)

WHEREFORE, the petition for rehearing before the Court *en banc* should be denied.

Respectfully submitted,

HENRY WEISS
HERBERT LEVY
605 Third Avenue
New York 16, New York

JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.

*Attorneys for Intervenor
Air Line Pilots Association*

August 5, 1963

BRIEF FOR INTERVENOR

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, LEWIS H. HOLMAN, ET AL.,
Petitioners,

CIVIL AERONAUTICS BOARD, Respondent,
AIR LINE PILOTS ASSOCIATION, Intervenor.

On Petition for Review of Orders of the
Civil Aeronautics Board

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 25 1963

HENRY WEISS
HERBERT LEVY
50 East 42nd Street
New York 17, New York

JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.
Attorneys for Intervenor
Air Line Pilots Association

STATEMENT OF QUESTIONS PRESENTED

The brief of the petitioners correctly states the issues as set forth in the pre-hearing conference stipulation between the parties, as amended, and as approved by the Court, presented by the initial petition for review.

The amended petition seeks review of Board Order No. E-19162, dated January 3, 1963, dismissing petitioners application to the Board for intervention in the proceeding in Docket No. 11654, reconsideration of the prior Board orders therein, suspension thereof, and a rehearing. There is thus also presented the issue of the validity of this Board action.

TABLE OF CONTENTS

	<i>Page</i>
Counter-Statement of the Case	1
A. Dispute Between ALPA and Southern Which Gave Rise To Proceeding Before Board	2
B. Proceedings Before the Civil Aeronautics Board	6
Statutes and Regulations Involved	16
Summary of Argument	16
I. The Petition for Review, as Amended, Should Be Dismissed	16
II. The Board Had Jurisdiction to Issue the Orders Challenged By Petitioners	18
III. The Board Was Not Required to Make Peti- tioners Parties to the Proceeding On ALPA's Complaint in the Absence of a Timely Petition to Intervene Before the Proceedings Became Moot	19
IV. The Civil Aeronautics Board Did Not Err in Its Orders in This Case	19
V. ALPA Did Not Violate Any Duty Owed to Peti- tioners	21
 Argument	
I. The Petition for Review, As Amended, Should Be Dismissed	22
A. The Board Orders Which Petitioners Seek to Set Aside Are Now Moot and There Are No Circumstances Justifying a Review Thereof	22
B. The Petition for Review Should Be Dismissed As Untimely Filed	25
II. The Board Had Jurisdiction To Issue The Orders Challenged By Petitioners	27
A. The Board's Jurisdiction to Entertain ALPA's Complaint Is Not Properly Before the Court	27

Table of Contents Continued

	Page
B. The Board Had Jurisdiction to Entertain the ALPA Complaint and Issue the Orders Involved	29
1. The Language of the Statute Clearly Confers Jurisdiction Upon the Board	29
2. The Legislative History of Section 401(k) of the Statute Supports the Plain Meaning Thereof	31
3. The Board Has Consistently Interpreted the Federal Aviation Act of 1958 and Its Predecessor Statute, the Civil Aeronautics Act of 1938, as Authorizing It To Enforce the Provisions of the Railway Labor Act Against Air Carriers	34
III. The Board Was Not Required to Make Petitioners Parties To The Proceeding On ALPA's Complaint In The Absence of A Timely Petition To Intervene Therein	34
A. Petitioners' Claim That They Were Indispensable Parties to This Proceeding Is Not An Issue Properly Before This Court	35
B. Petitioners Had a Legal Duty to Assert Any Interest They Had in the Proceeding on ALPA's Complaint by the Filing of a Petition to Intervene Therein in Accordance With the Board's Regulations	36
C. Petitioners Cannot Justify a Failure to Seek Timely Intervention in the Board Proceeding on Lack of Notice as They Had Legal Notice of the Hearing	38
D. Petitioners Had Actual Notice of the Board Proceeding Which Required a Timely Assertion of Their Interest	39
IV. The Civil Aeronautics Board Did Not Err In Its Orders In This Case	40
A. The Civil Aeronautics Board Correctly Found That the Bargaining Demands Made By Southern Were Unlawful and Constituted Unfair Labor Practices	40

Table of Contents Continued

iii

	Page
1. The Forfeiture of Seniority Demand of Southern Was Unlawful	42
2. Southern's Non-Reviewable Discipline De- mand Was Unlawful	45
B. The Civil Aeronautics Board Correctly Found That By Reason of Southern's Unlaw- ful Demands the Strike Became an Unfair Labor Practice Strike, Thus Entitling Strik- ers Not Yet Replaced to Reinstatement With Their Seniority Unimpaired	46
C. The Board Did Not Err in Dismissing Peti- tioners' Untimely Application to Intervene in the Board Proceeding and for Reconsidera- tion of the Board's Orders Along With a Rehearing	47
V. ALPA Did Not Violate Any Duty Owed To Petitioners	48
Conclusion	50
Appendix A	51
Federal Aviation Act of 1958 (49 U.S.C.A., Sections 1301 et seq.)	51
Railway Labor Act (45 U.S.C.A., Sections 151 et seq.)	54
Federal Register Act (44 U.S.C.A., Sections 301 et seq.)	59
National Labor Relations Act (29 U.S.C.A., Sections 151 et seq.)	60
Regulations of Civil Aeronautics Board (17 F.R. 3020 et seq.); 26 F.R. 8054; 27 F.R. 12545	61

INDEX TO CITATIONS

CASES:

Air Line Pilots Association v. Southern Airways, Inc. (Docket No. 11654), Orders No. E-18560, dated July 5, 1960; No. E-18737, dated August 27, 1962 and No. E-19162, dated January 3, 1963	1
Air Line Pilots Association v. Southern Airways, Inc., (CA No. 2982, U.S.D.C. Tenn., Nashville Divi- sion)	12
Airlines Negotiating Conference, 8 C.A.B. 354 (1947) ..	34

Table of Contents Continued

	Page
American Airlines, Inc. v. Air Line Pilots Association, 169 F. Supp. 777 (S.D.N.Y., 1958)	41
Aris Gloves, Inc. v. United States, 281 F. 2d 914 (CCPA, 1958)	38, 39
Atlantic Seaboard Corporation v. Federal Power Com- mission, 200 F. 2d 797 (4th Cir., 1953)	23
Ballas Egg Products, Inc. v. NLRB, 283 F. 2d 871 (6th Cir., 1960)	43
Dyer v. Securities and Exchange Commission, 266 F. 2d 33 (8th Cir., 1959)	23
Erie Resistor Corp., 132 NLRB 621	43, 44
Erie Resistor Corp. v. NLRB, 303 F. 2d 359 (3rd Cir., 1962)	44
Federal Power Comm. v. Idaho Power Co., 344 U.S. 17, 20 (1952)	27
Ford Motor Company v. Huffman, 345 U.S. 330, 338 (1953)	49
General Drivers, Local 662 v. NLRB, 302 F. 2d 908 (D.C. Cir., 1962)	47
Grand Lodge v. Girard Lodge, 384 Pa. 248, 120 A. 2d 523 (1956)	49
Griffin Wheel Co., 136 NLRB No. 144	43
Holman, et al. v. Southern Airways, et al., (CA 8131 U.S.D.C. Northern District of Ga.)	16
Home Loan Bank Board v. Mallonee, 196 F. 2d 336, 376 (9th Cir., 1952), cert. den. 345 U.S. 952, reh. den. 345 U.S. 978	37
Inland Steel Company v. NLRB, 170 F. 2d 247, cert. den. 336 U.S. 960 (1949)	47
Kohler Co., 128 NLRB 1062, 1083-4, 1085-7, 1109 (1960), enforced in part, 300 F. 2d 699 (D.C. Cir., 1962), cert. den. 82 Sup. Ct. 1258 (1962)	49
Marine Midland Trust Company of New York v. Eybro Corporation, 58 F. 2d 165 at page 168 (2nd Cir., 1932)	27
NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) ..	42
NLRB v. California Date Growers Ass'n, 259 F. 2d 587 (9th Cir., 1958)	43, 44
NLRB v. Crosby Chemicals, Inc., 188 F. 2d 91 (5th Cir., 1951)	46
NLRB v. Deena Artware, Inc., 198 F. 2d 645 (6th Cir., 1952)	47

Table of Contents Continued

v

	Page
NLRB v. Giustina Bros., 235 F. 2d 371 (9th Cir., 1958)	46
NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333 (1938)	43
NLRB v. Mt. Clemens Pottery Co., 147 F. 2d 262 (6th Cir., 1945)	47
NLRB v. N.M.U., 175 F. 2d 686 (2d Cir., 1949)	42
NLRB v. Robinson, 251 F. 2d 639 (6th Cir., 1958)	42
NLRB v. Wheeling Pipe Line, Inc., 229 F. 2d 391 (8th Cir., 1956)	42
NLRB v. Wooster Division of Borg-Warner Corp., 236 F. 2d 898, 907 (6th Cir., 1956)	46, 47
National Association of Security Dealers, Inc. v. Securities and Exchange Commission, 143 F. 2d 62 (3rd Cir., 1944)	23
New England Air Express v. Civil Aeronautics Board, 194 F. 2d 894, 90 U.S. App. D.C. 15 (1952)	29
Olin Mathieson Chemical Corp., v. NLRB, 232 F. 2d 158 (4th Cir., 1956), <i>aff'd.</i> 352 U.S. 1020	43, 44
Phillips v. Securities and Exchange Commission, 171 F. 2d 280 (2nd Cir., 1948)	27
Railroad Trainmen v. Georgia Railway, 305 F. 2d 605 (5th Cir., 1962)	41, 45
Red River Broadcasting Co. v. Federal Communications Commission, 98 F. 2d 282, 69 U.S. App. D.C. 1, (1938), <i>cert den.</i> , 305 U.S. 625	36, 37
Shenandoah Dives Mining Co., 35 NLRB 1153 (1941)	49
Six Carrier Mutual Aid Pact (Docket No. 9977)	29
Stewart Die Casting Corp. v. NLRB, 114 F. 2d 849 (7th Cir., 1940), <i>enforcing as modified</i> , 14 NLRB 872, <i>cert. den.</i> 312 U.S. 680 (1941)	44
Swarco, Inc. v. NLRB, 303 F. 2d 668 (6th Cir., 1962)	43, 44
Texas and N. O. Railroad v. Clerks, 281 U.S. 548 (1930)	41
Trainmen v. Toledo, P. & W. Railroad, 321 U.S. 50, 61 (1944)	41
United States v. American Trucking Associations, 310 U.S. 534, 549 (1940)	34
Vulcanized Rubber and Plastics Company v. Federal Trade Commission, 258 F. 2d 684, 103 U.S. App. D.C. 384 (1958)	27
Washougal Woolen Mills, 23 NLRB 1 (1940)	49
Wilson & Co., Inc. v. NLRB, 120 F. 2d 913, 924 (7th Cir., 1941)	46

Table of Contents Continued

STATUTES AND REGULATIONS:	Page
Civil Aeronautics Act of 1938, as amend (49 U.S.C.A., Sections 401 et seq.)	
Section 401	31, 33
Section 401(h)	33
Section 412	34
Federal Aviation Act of 1958 (49 U.S.C.A., Sections 1301 et seq.)	
Section 1(27)	29
Section 204(a)	10
Section 401(g)	10, 11, 18, 30, 31, 33
Section 401(h)	33, 34
Section 412	33
Section 1002(a)	10, 29
Section 1002(b)	10, 29
Section 1002(c)	10, 29
Section 1006(a)	13, 26
Section 1006(e)	18, 27, 35
Federal Register Act (44 U.S.C.A., Sections 301 et seq.)	
Section 8	38
Judicial Code (28 U.S.C.A., Sections 1 et seq.)	
Section 2112	13
National Labor Relations Act (29 U.S.C.A., Sections 151 et seq.)	
Section 8(a)1	41
Section 8(a)3	41
Section 8(a)5	41
Section 8(a)8	41
Section 8(d)	41
Railway Labor Act (45 U.S.C.A., Sections 151 et seq.)	
Section 1	30
Section 2, First	10-12, 30, 41, 46
Section 4	30, 42

Table of Contents Continued

vii

	Page
Section 5	2, 3
Section 6	3
Section 10	3
Section 204	11, 12, 45
 Regulation of Civil Aeronautics Board—Part 302, 17 F.R. 3020 et seq., as amended; 26 F.R. 8054; 27 F.R. 12545	
Section 302.15	9, 36
Section 302.30(c)	28
Section 302.37	13, 26
Section 302.201	5, 36
Section 302.207	7
Section 302.209	7
Section 302.210	8
 MISCELLANEOUS:	
Federal Register, Volume 25, October 28 and November 8, 1960, pages 10372, 10667	8, 38
Hearings on H.R. 5234 before House Committee on Interstate and Foreign Commerce, March and April 1937, pages 202, 213, 370	31
Hearings on H.R. 9738 before House Committee on Interstate and Foreign Commerce, March and April 1938, pages 10, 213, 215, 237, 238	32
Hearings on S. 2 before Subcommittee of Senate Committee on Interstate Commerce, March and April 1937, pages 22, 24, 450, 585, 589, 590	31
Hearings on S. 3659 before Subcommittee of Senate Committee on Interstate Commerce on April 6 and 7, 1938, page 39	32
Report No. 2065, 75th Cong., 2d Session, page 69 ...	32



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION, LEWIS H. HOLMAN, ET AL.,
Petitioners,
v.

CIVIL AERONAUTICS BOARD, *Respondent*,
AIR LINE PILOTS ASSOCIATION, *Intervenor*.

On Petition for Review of Orders of the
Civil Aeronautics Board

BRIEF FOR INTERVENOR

COUNTER-STATEMENT OF THE CASE

The intervenor Air Line Pilots Association, International (hereinafter called "ALPA"), deems it necessary to set forth the following counter-statement of the case.

The petition for review, as amended, asks the Court to modify or set aside and annul Civil Aeronautics Board Orders No. E-18560, dated July 5, 1962, No. E-18737, dated August 27, 1962, and No. E-19162, dated January 3, 1963, entered in an administrative proceeding identified as *Air Line Pilots Association v. Southern Airways, Inc.* (Docket No. 11654), insofar as such orders affect jobs and seniority of petitioners on Southern.

**A. Dispute Between ALPA and
Southern Which Gave Rise to
Proceeding Before Board**

The administrative proceeding before the Board which resulted in the issuance of orders here involved developed out of a dispute between ALPA and Southern Airways concerning the negotiation of changes in a collective bargaining agreement governing the rates of pay, rules and working conditions of pilot personnel employed by Southern.

This dispute began on July 30, 1959. For some years prior thereto ALPA had been the duly certified representative under the Railway Labor Act (45 U.S.C.A., Section 151 et seq.) for the pilot personnel of Southern and there was in effect a collective bargaining agreement governing the rates of pay, rules and working conditions of such personnel. (Tr. 95). On July 30, 1959, ALPA served a notice upon Southern in accordance with the requirements of Section 6 of the Railway Labor Act (45 U.S.C.A., Section 156) proposing certain changes in that agreement (ALPA Exhibit 3). Representatives of the parties met on September 21, 1959, to begin collective bargaining negotiations on ALPA's proposals. (Tr. 15; ALPA Ex. 3). These negotiations did not result in an agreement and on October 9, 1959, ALPA invoked the mediation services of the National Mediation Board in the dispute pursuant to the provisions of Section 5 of the Railway Labor Act (45 U.S.C.A., Section 155).¹

Thereafter, in January 1960, negotiating sessions were conducted between the parties under the auspices of a mediator assigned by the National Mediation Board. (Tr. 161). These sessions failed to produce an agreement (Tr. 93) and the National Mediation Board proffered arbitration to the parties. (Tr. 113) Both ALPA and Southern declined at that time. (Tr. 114, 115) ALPA's reason for such declination was its belief that the subject of the dispute did not present any unusual problems which could not and should not be reconciled by negotiation. (Tr. 623). However, ALPA's estimate of the situation proved to be opti-

¹ Tr. 230; ALPA Ex. 10.

mistic and subsequent negotiations between the parties reached an impasse. Therefore, the National Mediation Board, in fulfillment of the requirements of Section 5 of the Railway Labor Act, again proffered arbitration to the parties. (Tr. 220-222) ALPA accepted this proffer of arbitration in order to avoid a strike. (ALPA Exs. 34, 35). Southern declined the proffer of arbitration. The record shows that when arbitration was first suggested to Southern's representative by National Mediation Board Member Robert Boyd, the Board Member was advised by the carrier's representative "that the carrier was reluctant to turn over its business to some college professor who might be selected as an arbitrator". (Tr. 413-416). Southern's representative also advised ALPA at this time that it could not arbitrate because the carrier had a poor case and could not prevail before an arbitrator. (Tr. 389, 390). During the hearing before the Civil Aeronautics Board, Southern's President testified that the carrier's refusal to arbitrate the dispute was based on (a) a belief that the subject-matter of the dispute did not lend itself to arbitration as the issues were too broad; and (b) the carrier had been unsuccessful in its last arbitration with ALPA. (Tr. 1187, 1220, 1221; ALPA Ex. 57).

ALPA made a final effort to avoid a strike by advising Southern that it would submit the dispute for settlement to any kind of procedure—fact finding, arbitration, or anything else—for decision or recommendation. This offer was not accepted by the carrier. (Tr. 413, 1299).

The carrier's refusal to arbitrate the dispute exhausted the procedures of the Railway Labor Act for negotiation, mediation, and, if possible, arbitration of disputes relating to the making of collective bargaining agreements concerning rates of pay, rules and working conditions of the carrier's employees. No procedure for resolving the impasse between the parties remained to the pilots other than to withdraw from the service of the carrier which they did on June 5, 1960. (Tr. 223, 225).²

² A Presidential Emergency fact finding Board, authorized by Section 10 of the Railway Labor Act (45 U.S.C.A., Section 160), was not appointed in the dispute.

On July 11 and 12, 1960, the parties renewed negotiations in the dispute under the auspices of the National Mediation Board. (Tr. 140, 142, 144, 145). These meetings were unable to produce an agreement because Southern insisted as a condition of any such agreement that (1) the striking pilots forfeit their accumulated seniority and begin accumulating new seniority only from the date on which they returned to work; and (2) that ALPA give Southern the right to take unilateral disciplinary action, including ineligibility to return to service, with respect to any pilot that Southern considered had engaged in misconduct during the strike. (ALPA Ex. 43; Tr. 332-333).

Further negotiations began on July 27, 1960. In these meetings Board Member Edwards sought to clarify the issues in dispute by going through the ALPA-Southern agreement item by item and having each party initial those items not in dispute. Mr. Edwards called this the "red book procedure". (Tr. 594, 598, 1291, 1295). Southern's principal negotiator refused to follow this procedure of the Board Member³ to narrow dispute terming it "a school-boy procedure" and "childish" and "an utter waste of time". (Tr. 1293, 1314). However, Mr. Edwards proceeded to mediate the dispute and strive for an agreement. Pursuant to this mediation on July 28, 1960, he proposed a settlement of all the issues between the parties raised by ALPA's notice and proposals of July 30, 1959. These proposals of National Mediation Board Member Edwards, described by him as an "advisory arbitration award", were written on a blackboard (Tr. 599, 600, 1293, 1294) and were reproduced in ALPA Ex. 47. (Tr. 600, 1187, 1294)

Had these proposals been accepted by both sides, the strike would have ended and the dispute terminated. ALPA's negotiating committee accepted the proposals (Tr. 182, 268, 269, 601, 1294), in a letter dated July 28, 1960 (ALPA Ex. 48), which reads as follows:

"The Southern pilots Negotiating Committee has considered your proposal which you reduced to writing

³ Mr. Edwards is a long-experienced Mediation Board Member, arbitrator and member of Presidential Emergency Boards. (Tr. 598).

on the blackboard in room 148 at the Hilton Inn on Thursday, July 28, 1960.

"This committee believes that your proposal falls short of the pilots desires inasmuch as the Southern pilots desires for improvement in working conditions are currently being afforded to pilots of other comparable airlines, however, in order that this dispute can now be resolved, this committee accepts your proposal."

Under the same date, Southern sent a letter to Mr. Edwards, which read in pertinent part as follows: (ALPA Ex. 49)⁴

"Please be advised that Southern Airways, Inc. accepts in principle your award, subject to execution of an agreement disposing of all issues between Southern and ALPA., except insofar as it pertains to duration. Southern's position is that the contract should continue in effect for two years from the date of execution.

"Southern's acceptance of your advisory award is made without prejudice to its position concerning the following matters:

- (1) *Seniority*—Nearly 100 pilots have been employed since the strike began, and we require only about 40 additional pilots. We are willing to return to service as many of the strikers as our needs dictate, but their seniority will date from the date on which they return to work. (Emphasis supplied)
- (2) *Disciplinary Action*—Southern reserves the right to take disciplinary action, including ineligibility to return to service, in the case of pilots who have engaged in misconduct during the strike.
- (3) *Parking Aircraft*—Any agreement finally executed would have to provide for pilots' parking and moving aircraft."

Thus, the only aspect of Mr. Edwards' proposal not fully accepted by the carrier was the duration of the revised

⁴ Tr. 269, 270, 602, 1294.

agreement, i.e. whether it would be 18 months from July 1, 1960, or two years from date of signing. This one item, however, obviously could have been ironed out once the basic economic issues were determined. (Tr. 243, 244, 421).⁵

ALPA rejected these conditions imposed by Southern upon a settlement on the grounds that they were improper and illegal. (Tr. 618, 619).⁶

B. Proceedings Before the Civil Aeronautics Board

The administrative proceeding before the Board originated in a complaint filed by ALPA on July 22, 1960, against Southern Airways. (Tr. 1-8).

This complaint was filed pursuant to the provisions of Section 302.201 of the Board's rules of practice applicable to economic enforcement proceedings (Part 302 of the Board's Economic Regulations, 17 F. R. 3020, et seq., as amended; 26 F. R. 8054; 27 F. R. 12545). This Section read in pertinent part as follows:

"Any person may make a formal complaint to the Board with respect to anything done or omitted to be done by any person in contravention of any economic regulatory provisions of the act, or any rule, regulation, order, limitation, condition or other requirement established pursuant thereto. Every formal complaint shall conform to the requirements of § 302.3, concerning the form and filing of documents. The submission of a formal complaint by a person other than an Enforcement Attorney (hereinafter called a third party) shall not in itself result in the institution of a formal economic enforcement proceeding and a hearing with

⁵ The duration proposal of Southern had also been item (4) of the carrier's proposals of July 12, 1960 (ALPA Ex. 45), and while ALPA felt that this proposal was contrary to standard duration clauses in the airline industry (Tr. 516) and had been proposed by the carrier to avoid making an agreement (Tr. 517), it could have been worked out. (Tr. 332).

⁶ This rejection included item (3) relating to the parking of aircraft, which had not previously been proposed in the negotiations. However, this was a relatively minor item and, had it been divorced from the seniority and disciplinary proposals of Southern, would not have produced an impasse in the negotiations.

respect to the complaint unless and until the Director of the Bureau of Enforcement docketed a petition for enforcement with respect to such complaint, or a portion thereof, in accordance with § 302.206."

This complaint in substance alleged that a dispute had arisen between ALPA and Southern concerning the terms and conditions of an amended collective bargaining agreement between the parties; that Southern had violated the terms and conditions of its certificate, the provisions of the Federal Aviation Act, and the provisions of the Railway Labor Act in its conduct with respect to such dispute; that such unlawful conduct had resulted in a withdrawal of service by Southern's pilots beginning on June 5, 1960, and continuing to the present.

ALPA therefore sought relief in an order of the Civil Aeronautics Board directing Southern Airways, Inc. to comply with the provisions of the two statutes and in the event of that carrier's failure to do so, the Board was requested to suspend or revoke all certificates authorizing Southern Airways, Inc. to engage in air transportation which had heretofore been issued to said carrier by the Board. (Tr. 7, 8)

On August 8, 1960, Southern filed an answer to ALPA's complaint in accordance with the provisions of Section 302.207 of the Board's rules of practice. (Tr. 11). This answer admitted the existence of the dispute between ALPA and Southern, the strike by ALPA, as well as the continued operations by Southern with "newly employed pilots". This answer denied any violations by Southern of the terms and conditions of its certificates, or of either the Federal Aviation Act or the Railway Labor Act.

Part IV of Southern's answer (Tr. 11) alleged that the Board lacked jurisdiction of the subject-matter of the complaint. Southern prayed that the complaint be dismissed. (Tr. 12).

A reply to this answer was filed by ALPA dated September 6, 1960, in accordance with Section 302.209 of the Board's Regulations. (Tr. 60)

On September 26, 1960, the Director of the Bureau of Enforcement docketed under the Board's rules a "Petition for Enforcement", which read in pertinent part as follows: (Tr. 75)

"In the opinion of the undersigned, Director of the Bureau of Enforcement, there are reasonable grounds to believe that certain provisions of the Federal Aviation Act of 1958, as amended, and requirements thereunder have been violated by Southern Airways, Inc., as alleged in the Complaint filed by the Air Line Pilots Association on July 22, 1960, which complaint is hereby incorporated herein by reference, and that formal investigation of such alleged violations by the Board is in the public interest. No offer to satisfy the complaint as permitted by Rule 204(c) of the Rules of Practice in Economic Proceedings has been served.

"Therefore, this petition for enforcement is docketed under the provisions of Rule 206 of the said Rules of Practice and an enforcement proceeding thereby is instituted so that the Board may determine whether any violations have been committed as alleged in said complaint and whether the relief requested therein should be granted."

The proceeding thus instituted by the docketing of the petition for enforcement was publicly noticed for hearing to begin on November 15, 1960, (Tr. 77) through a notice signed by the Chief Examiner of the Board, dated October 25, 1960, and published in the Federal Register on October 28, 1960 (Vol. 25, page 10372). Subsequently, on November 8, 1960, a notice was issued by the Chief Examiner and filed in the Federal Register for that date (Vol. 25, page 10667) postponing the hearing in the proceeding from November 15, 1960, to December 1, 1960. (Tr. 81)

The Board's rules of practice applicable to economic enforcement proceedings (Section 302.210) provide as follows with respect to parties in such proceedings:

"The parties to an economic enforcement proceeding shall be the Board (represented by an Enforcement Attorney), the respondent, any person whose formal complaint alleged violations which were later covered by the petition for enforcement, and any other person permitted to intervene pursuant to § 302.15."

Section 302.15 of the Board's rules of practice to which reference is made by Section 302.210, quoted above, provides for intervention in Board proceedings by (1) any person who has a statutory right to be made a party to a proceeding, and (2) any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business. Intervention is achieved by the filing of a petition to intervene in cases such as the one involved in Docket No. 11654 within 15 days prior to the hearing therein, and the grant of such petition by the Board. Under subparagraph (c)(iii) of Rule 15, a petition to intervene which is not filed within the designated period may be entertained and granted by the Board upon a showing of good cause for the failure to make a timely filing.

The petitioners did not file a petition to intervene in the proceeding in Docket No. 11654 prior to the beginning of the hearing therein.

The hearing in the proceeding began on December 1, 1960 (Tr. 83), and continued with necessary interruptions through January 18, 1961. (Tr. 1402). None of the petitioners appeared at the hearing or made any effort to intervene in the proceeding during this period. The parties appearing and participating in the hearing were ALPA, Southern Airways, and the Board's Bureau of Enforcement. (Tr. 86).

On September 23, 1961, the Hearing Examiner issued his Initial Decision. (Tr. 2168) This decision concluded (a) that the Board had jurisdiction to determine the issues raised by the pleadings; (b) that the evidence of record failed to sustain the allegations of the complaint filed by ALPA; and (c) that the complaint should be dismissed. (Tr. 2169). This Initial Decision was given publicity in the newspapers and petitioners were aware of its issuance. (Tr. 2724). However, none of the petitioners made any effort at the time to intervene in the proceedings or to take any other action with respect thereto.

On October 9, 1961, ALPA filed exceptions with the Board to the Initial Decision. (Tr. 2261). A brief was filed with

the Board by ALPA on November 16, 1961, in support of these exceptions. (Tr. 2316). On the same date, Southern Airways filed a brief in support of the Initial Decision. The Bureau of Enforcement filed a letter in lieu of brief supporting the Initial Decision. (Tr. 2314). The issues were orally argued before the Board on November 30, 1961. (Tr. 2452).

On May 25, 1962, the Board issued a press release announcing that it had reached a tentative decision in the proceeding. (Tr. 2556). This press release spelled out the Board's conclusions and stated that they would be embodied in a formal decision to be issued at a later date.

Petitioners concede that they were aware of this press release at the time it was issued and the fact that their job rights were being considered in the Board proceeding (Tr. 2724). Yet petitioners made no effort to intervene in the Board proceeding or to take any other action to protect their rights although a period of six weeks elapsed between the issuance of the press release and the serving of the formal Board opinion and order finalizing the tentative decision announced in the press release. This Board Order (No. E-18560) was dated July 5, 1962, and served on July 6, 1962. (Tr. 2558). In the opinion accompanying the Order the Board, on the basis of all of the evidence and facts of record, found as follows: (Tr. 2590, 2591)

"1. That, pursuant to the powers vested in it by Sections 204(a), 401(g), 401(k), and 1002(a) and (c) of the Federal Aviation Act of 1958, as amended, the Civil Aeronautics Board has jurisdiction to hear and determine the complaint filed by ALPA in this proceeding alleging violations of the Railway Labor Act and the Federal Aviation Act by Southern;

"2. That Southern at all times from the inception of the negotiations on the new labor contract in July 1959, up to July 12, 1960, bargained in good faith with ALPA in compliance with Section 2, First, of the Railway Labor Act, as amended;

"3. That on July 12, 1960, Southern and ALPA reached an impasse in their negotiations on requests by ALPA and counter demands by Southern with re-

spect to (1) the reinstatement and seniority of the strikers in relation to the replacement employees, and (2) disciplinary action against striking employees;

"4. That Southern's demand relating to job retention and seniority is unlawful because it entails unreasonable and undue discrimination against the striking employees;

"5. That Southern's demand relating to non-reviewable disciplinary action is illegal *per se* because it would deprive employees of their statutory rights to have their grievances adjusted in accordance with procedures established pursuant to Section 204 of the Railway Labor Act and constitutes improper coercion and an unwarranted interference with protected rights of employees;

"6. That the continued insistence by Southern on its aforesaid demands as a condition for settlement of the strike and agreement on a new labor contract would constitute a failure by Southern to bargain in good faith with ALPA as required by Section 2, First, of the Railway Labor Act;

"7. That Southern should be ordered to comply forthwith with its obligations under the Railway Labor Act to bargain in good faith with ALPA, and compliance with such order should be achieved by Southern within a period of thirty (30) days after issuance thereof, failing which, Southern's authority to engage in air transportation would be subject to suspension or revocation pursuant to Section 401(g) of the Federal Aviation Act;

"8. That Southern will not achieve compliance with such Board order unless in the settlement of the dispute and agreement on a new labor contract with ALPA it is guided by the principles set out above in our opinion;

"9. That should ALPA not observe the principles set out above or otherwise not cooperate with Southern in the settlement of the dispute and agreement on a new labor contract, this be taken into account in considering any further action by the Board in this proceeding;

"10. That ALPA's contention that Southern has failed to comply with certain mandatory procedures

of the Railway Labor Act with respect to the matters of seniority and discipline be rejected; and

"11. That the various exceptions and other contentions of the parties, except to the extent indicated above, do not require any change in our findings and conclusions reached herein."

The Board's order contained the following directive:
(Tr. 2612)

"IT IS ORDERED THAT:

"1. Southern Airways, Inc., shall within thirty (30) days after issuance of this order bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act and in accordance with the attached opinion;

"2. The Board retains jurisdiction over this proceeding until further notice for the purpose of assuring compliance by Southern Airways, Inc., with this order."

The Board in its opinion accompanying this order took note of the fact that United States District Judge William E. Miller in the case of *Air Line Pilots Association v. Southern Airways, Inc.*, (CA No. 2982, U. S. District Court for the Middle District of Tennessee, Nashville Division) involving a suit by ALPA for damages and injunctive relief had issued an opinion finding that Southern's insistence that the striking pilots waive their rights to the grievance machinery and procedures contemplated by Section 204 of the Railway Labor Act constituted a violation of that statute, but that the carrier's proposals with respect to forfeiture of seniority by the striking pilots did not violate the statute. The Board stated that "we cannot find Southern's demand relating to super-seniority to be warranted by the circumstances disclosed by the record in the present proceeding." (Tr. 2579-2581) This finding reflects the far more comprehensive record before the Civil Aeronautics Board made after a full hearing in contrast to the record before the Tennessee District Court on motion for summary judgment.

Section 302.37 of the Board's rules of practice in economic proceedings provides that any party to a proceeding may file a petition for reconsideration, rehearing, or re-argument of a final order issued by the Board within 20 days after service thereof. No petition for reconsideration of the Board's order of July 5, 1962, was filed with the Board.

On July 6, 1962, ALPA filed in this Court (Case No. 17,149) a petition requesting that the Court review Board order No. E-18560 to provide that Southern should reinstate all pilots employed by it on June 5, 1960, with full seniority and that failing such reinstatement Southern's certificate should be revoked by reason of its refusal to comply with Section 401(k)(4) of the Federal Aviation Act of 1958, as amended. On the same date but subsequent in point of time to the filing of the petition by ALPA in this Court Southern filed a petition in the United States Court of Appeals for the Fifth Circuit (Case No. 19,801) requesting that that Court review and set aside Board order No. E-19560. Southern also filed with that Court a motion for a stay of the Board order.

On August 28, 1962, the United States Court of Appeals for the Fifth Circuit entered an order reciting that this Court had acquired exclusive jurisdiction to review Board order No. E-18560 by reason of the provisions of 49 U.S.C.A., Section 1486 and 28 U.S.C.A., Section 2112, and directing that Southern's petition for review of the Board order be transferred to this Court. No action was therefore taken by the Fifth Circuit on Southern's motion for a stay of the Board's order. This order was entered by that Court in response to a motion filed by the Board.

On August 14, 1962, Southern Airways filed a document with the Board entitled "Petition For Directive By Southern Airways, Inc." (Tr. 2660). This document recited that Southern Airways was in the process of complying with Board order No. E-18560 subject to judicial review of such order. Southern requested the Board to clarify its opinion and order in certain respects. On August 20, 1962, ALPA filed a reply to Southern's petition and a request

that the Board direct Southern to effect immediate compliance with order No. E-18560. (Tr. 2669). On August 27, 1962, the Board issued order No. E-18737. (Tr. 2678) This order contained a discussion of the matters about which Southern had requested clarification and concluded in its directory portion as follows: (Tr. 2680)

"ACCORDINGLY, IT IS ORDERED:

- “1. That Southern be guided in its future negotiations with ALPA, pursuant to Order E-18560, adopted July 5, 1962, by the determination stated above;
- “2. That ALPA’s petition for an order directing compliance with Order E-18560 be denied, except to the extent above granted; and

“3. That the Board continue to retain jurisdiction over this proceeding until further notice for the purpose of assuring compliance by Southern with the Board’s order.”

Although the petitioners had been aware of the Board’s determination since the issuance of its press release on May 25, 1962 (Tr. 2724), up to this point they had taken no action in the Board proceeding and had made no effort to assert any rights. On September 21, 1962, ALPA and Southern Airways signed a memorandum agreement identified as a “Back To Work Agreement”. (Tr. 2756).

Section 2 of the agreement provided for application of the principle of seniority based on date of hire uniformly to all pilots covered by the agreement, including both striking and replacement pilots. (Tr. 2758).

The agreement also provided that Southern and ALPA would withdraw, dissolve or dismiss without cost to either party any and all claims, complaints and causes of action instituted by either party, including their respective petitions to review the determinations and orders of the Civil Aeronautics Board in the proceeding in Docket No. 11654. Thereafter, upon stipulation of the parties, ALPA and Southern’s petitions to review Board Order No. E-18560 were dismissed by this Court. Also ALPA’s appeal in the Sixth Circuit from the decision of the District Court at Nashville was dismissed by stipulation.

By this time more than three months had elapsed since the Board had announced in its press release of May 25, 1962, its decision in the proceeding in Docket No. 11654, which came to the notice of petitioners, and yet they had taken no action to assert any interest in such action or in the proceeding.

On October 26, 1962, the petitioners filed their original petition in this Court to review Board Orders No. E-18560, dated July 5, 1962, and No. E-18737, dated August 27, 1962, without having made any effort to assert any interest in those orders before the Board, although some four months had by this time elapsed since the petitioners concede that they were made aware of the Board's actions by the issuance of its press release of May 25, 1962.

Finally, on October 29, 1962, petitioners filed with the Board a petition (1) for leave to intervene in the proceeding in Docket No. 11654; (2) for a rehearing in such proceeding; (3) for reconsideration of Board Orders No. E-18560 and No. E-18737; and (4) a suspension of such orders. (Tr. 2685).

The petition was dismissed by Board order No. E-19162, dated January 3, 1963. (Tr. 2779) In this order the Board noted that the petition was untimely and need not be entertained but nonetheless accepted it for filing and considered it on its merits. The order also noted that Southern and ALPA had resumed their negotiations and concluded a contract on September 21, 1962, which resolved their dispute and that there was no showing of any lack of good faith bargaining in these negotiations and that the Board's rules do not require that employees of air carriers which are the subject of complaints be made parties in labor controversies.

Thereafter, petitioners filed a motion for leave to amend the petition for review to include order No. E-19162. This motion was granted by this Court's order of February 7, 1963.

On November 13, 1962, petitioners filed a motion with this Court to stay Board orders No. E-18560 and No. E-18737 and the effectiveness of the agreement of September

21, 1962, between ALPA and Southern Airways. Such motion was denied by this Court's *Per Curiam* order of November 21, 1962.

Similar requests for stays by petitioners were denied by the United States District Court for the Northern District of Georgia, Atlanta Division, (Civil Action 8131) and upon appeal by the Fifth Circuit in the case of *Holman, et al. v. Southern Airways and Air Line Pilots Association*, while the present petitions for review were pending.

Petitioners are continuing to press their petition for review of the Board orders in this Court while, at the same time, they seek to achieve their objectives through actions in the Fifth Circuit and before the National Mediation Board.

STATUTES AND REGULATIONS INVOLVED

The Federal statutes and regulations of the Civil Aeronautics Board which are involved in this petition for review are set forth in full in Appendix A hereto and are cited or quoted at appropriate places in the brief.

SUMMARY OF ARGUMENT

I.

The Petition for Review, as Amended, Should Be Dismissed

A. The Board order No. E-18560, dated July 5, 1962, which petitioners seek to have set aside, directed Southern to comply with its obligations under the Railway Labor Act to bargain in good faith with ALPA and set out certain principles for the guidance of the parties in such bargaining. Thereafter, ALPA and Southern engaged in collective bargaining and signed an agreement on September 21, 1962, terminating their dispute. The petition for review was not filed until October 26, 1962. The basic Board order involved, as well as the subject-matter of such order, had, therefore, become moot when the petition for review of such order was filed.

Nor is this a situation justifying the review of the Board's action even though the orders involved are moot.

It was not physically impossible to get proceedings for review perfected and subject to hearing and disposition after the issuance of the Board's order and before the subject-matter of the dispute became moot. Petitioners had actual notice of the Hearing Examiner's Initial Decision of September 26, 1961, and actual notice of the Board's intended disposition of the proceeding on May 25, 1962, as well as legal notice of the proceeding through publication in the Federal Register of notices of hearing in October and November 1960. However, petitioners did nothing until almost six weeks after ALPA and Southern through negotiations had terminated their dispute and some five months after petitioners had actual notice of the Board's order. A review will not establish legal principles of general applicability since the Board's decision was based upon a factual record before it. Such a review will, moreover, serve to create uncertainty with respect to a serious labor dispute that is now settled to the detriment of the public and the aviation industry as well as the parties involved.

B. The petition for review should be dismissed as untimely filed. Section 1006(a) of the Federal Aviation Act of 1958 requires that a petition to review Board order No. E-18560, dated July 5, 1962, be filed within sixty days thereafter. The running of this statutory limitation was not tolled by the filing of a petition for reconsideration since none was filed, nor was it tolled by the request by Southern for a clarification of the Board's order and the subsequent issuance of such a clarification by the Board. Finally, the statutory time limit for filing the petition for review was not extended by the belated and untimely application of the petitioners to the Board on October 29, 1962, to reconsider its action and to reopen the proceeding.

III

The Board Had Jurisdiction to Issue the Orders Challenged
By Petitioners

A. Petitioners challenged the Board's jurisdiction to issue the orders involved. Section 1006(e) of the Federal Aviation Act of 1958 provides that no objection to an order of the Board shall be considered upon a petition to review such order unless the objection was urged before the Board. Although Southern's original answer to the ALPA complaint asserted that jurisdiction rested in either the National Mediation Board or the National Railroad Adjustment Board, it did not brief this issue to the Hearing Examiner. Nor did it file any exceptions to the Hearing Examiner's determination that the Board did have jurisdiction. Under the Board's rules of practice no issue is before the Board on exceptions to the Hearing Examiner's Initial Decision which has not been made the subject of exceptions. Thus, the jurisdictional issue was never before the Board and it simply adopted the Examiner's finding with respect thereto in issuing its final order.

B. Assuming *arguendo* that the jurisdictional issue is now properly before this Court, ALPA submits that the Board clearly did have jurisdiction. Section 401(k)(4) of the Federal Aviation Act makes it a condition upon the holding of a certificate by an air carrier that it comply with the requirements of the Railway Labor Act. Section 401(g) of the Federal Aviation Act of 1958 authorizes the Board to suspend or revoke certificates of public convenience and necessity for the failure of a carrier holding such certificate to comply with any provisions of the statute or any term or condition of its certificate. Thus, the plain and unambiguous language of the statute authorizes the Board to determine air carrier violations of the Railway Labor Act for the purpose of enforcing the regulatory requirements of the Federal Aviation Act.

The conclusion to be derived from the statutory language of the statute is supported by the legislative history of the Civil Aeronautics Act, which shows that Section 401(k)(4)

was originally proposed by representatives of ALPA for the purpose of protecting airline employees and was opposed by the air carriers on the grounds that it would make the Board the enforcing agency for the Railway Labor Act. It is also supported by a consistent Board interpretation of its authority over a period of some 15 years.

III.

The Board Was Not Required to Make Petitioners Parties to the Proceeding on ALPA's Complaint in the Absence of a Petition to Intervene Before the Proceedings Became Moot

Petitioners claim that they were indispensable parties to the proceeding on ALPA's complaint which required that the Board on its own initiative to at least give them formal notice of the proceeding. It is the position of ALPA that this issue is not properly before the Court and is without merit.

A. Petitioners' claim is not properly before the Court because it was not asserted to the Civil Aeronautics Board until October 29, 1962, after the Board orders and the subject-matter thereof had become mooted. Petitioners cannot justify this failure upon the basis of lack of notice of the proceeding. By their own admission, they had actual notice of the Initial Decision of the Hearing Examiner on September 26, 1961, and of the Board's press release of May 25, 1962, stating its tentative decision in the proceeding. Petitioners therefore had actual notice in time for them to assert to the Board an interest in the proceeding and their claim that they were indispensable parties thereto prior to the issuance of Board order No. E-18560 on July 5, 1962, and certainly before the subject-matter of such order had become moot.

B. Petitioners had a legal duty to seek intervention in the Board proceeding as provided in the Board's rules of practice even if they had a legal right to be permitted to intervene upon the filing of a timely petition. These regulations permit the grant of a petition to intervene upon a showing of good cause after the expiration of the time limit therefor in the regulations. In spite of actual notice,

petitioners did not file a petition to intervene until some six weeks after the Board orders were mooted and they have not shown good cause for failure to do so. They therefore have no basis to complain with respect to the procedures followed by the Board.

IV.

The Civil Aeronautics Board Did Not Err in Its Orders in This Case

The Board found that Southern's demands, as a condition for the settlement of its dispute with ALPA, that the striking pilots forfeit the seniority which they had accrued by service in Southern's employ and the conferring of superseniority upon replacement pilots violated the carrier's duty to bargain in good faith under the Railway Labor Act. The Board similarly so found with respect to Southern's demand that it have the complete non-reviewable right to discipline strikers who engaged during the strike in conduct which the carrier considered unlawful.

The Board upon all the evidence before it concluded that Southern made its demands that the striking pilots should forfeit their seniority for the purpose of punishing the strikers in exercising their lawful right to strike. The cases clearly establish that Southern's insistence on such a provision for concluding a collective bargaining agreement on the evidence before the Board constituted a failure to bargain in good faith.

In addition, Southern's demand included insistence upon placing replacement pilots upon a seniority list giving them job rights senior to the striking pilots and thus conferring superseniority upon the replacements. An employer may hire replacement employees in the course of an economic strike and need not at the conclusion thereof discharge such replacements to make room for returning strikers. Employers may not, however, grant superseniority to replacements in the sense of giving them seniority over the strikers for protection from future layoffs except where such a grant is absolutely necessary to keep the employer's operations in business during the strike. In this case the

record clearly showed that the grant of superseniority to replacements was not necessary to induce them to enter into Southern's employ or that such a promise was made by Southern to the replacements. Under these circumstances, the only purpose of Southern's insistence on superseniority for the replacement pilots was to punish the striking pilots and apply a forbidden coercion to them.

Southern's demand for a unilateral and non-reviewable right to discipline strikers was not simply a request for a power to discipline employees for misconduct but was an insistence upon the striking pilots surrendering their right under the Railway Labor Act to subject any determination of misconduct by Southern reviewed by a system board of adjustment established pursuant to that statute. Southern's insistence upon this disciplinary power was thus a cause of the prolongation of the strike and constituted a refusal to bargain in good faith.

Under established case law, the Board correctly concluded that Southern's actions converted the economic strike by its pilots into an unfair labor practice strike.

V.

ALPA Did Not Violate Any Duty Owed to Petitioners

The claim of petitioners that ALPA violated a duty owed to them in opposing the demands of Southern was never before the Board until the proceeding was mooted and simply constitutes a claim that ALPA should have permitted Southern to illegally discriminate in their favor. This claim conflicts with the established law. Nor did ALPA violate any duty to the petitioners when it terminated its dispute with Southern through the execution of a collective bargaining agreement on September 21, 1962, which applied uniformly the seniority principle of date of hire to all Southern pilots, including both the striking pilots and the replacement pilots. The integration of groups of employees upon the application of the seniority principle of date of hire is a well established practice which has been recognized as reasonable by the Courts.

ARGUMENT**L****THE PETITION FOR REVIEW, AS AMENDED, SHOULD BE
DISMISSED****A. The Board Orders Which Petitioners Seek to Set Aside Are
Now Moot and There Are No Circumstances Justifying a
Review Thereof**

Board order No. E-18560, dated July 5, 1962, directed Southern to comply with its obligations under the Railway Labor Act to bargain in good faith with ALPA and advised Southern that it would not achieve compliance with such Board directive unless in subsequent negotiations and settlement of its dispute with ALPA the carrier was guided by the principles set out in the opinion accompanying said order.

Neither ALPA nor Southern was satisfied with this order since it did not completely sustain the position of either party. Both, therefore, immediately sought judicial review of the order and Southern requested a stay thereof by the United States Court of Appeals for the Fifth Circuit. However, under the auspices of the National Mediation Board both ALPA and Southern, on or about July 23, 1962 (Tr. 26662), resumed their previously interrupted negotiations in an effort to see if they could then settle their dispute. During the course of such negotiations ALPA sought further Board directions to Southern and Southern requested an interpretation of the Board's accompanying opinion to order No. E-18560. (Tr. 2660, 2669). The Board, in Order No. E-18737, dated August 27, 1962, gave an interpretation of its prior opinion on the points raised by Southern and denied ALPA's request for any further directives to the carrier. (Tr. 2678).

ALPA and Southern then continued their negotiations and on September 21, 1962, ended their dispute with the execution of a collective bargaining agreement. (Tr. 2756). Both this Court and the United States Court of Appeals for the Fifth Circuit have refused to stay the implementation of that agreement.

When petitioners belatedly sought to have the Board reopen the proceeding and to suspend its orders, the Board issued order No. E-19162, dated January 3, 1963, which found, *inter alia*, that the matter was now moot and that no circumstances warranted the Board's taking any further action. (Tr. 2779). Courts of Appeals will not ordinarily review orders of administrative agencies where the matters covered by those orders have become moot. *National Association of Security Dealers, Inc. v. Securities and Exchange Commission*, 143 F. 2d 62 (3rd Cir., 1944); *Atlantic Seaboard Corporation v. Federal Power Commission*, 200 F. 2d 797 (4th Cir., 1953). It has been recognized that there may be situations which justify a review of orders of an administrative agency even though the matters with which such orders deal have become moot. *Dyer v. Securities and Exchange Commission*, 266 F. 2d 33 (8th Cir., 1959). It is submitted that this is not such a situation.

This is not a situation where it was physically impossible to get proceedings for review perfected and subject to hearing and disposition between the time the Board issued its order of July 5, 1962, and the execution of the agreement of September 21, 1962, between ALPA and Southern ending their dispute. Petitioners admit actual notice of the proceeding before the Board at least as early as the issuance of the Examiner's Initial Decision on September 26, 1961. (Tr. 2724). They also admit actual notice of the Board's disposition of the proceeding as set forth in the Board's press release of May 25, 1962.⁷ (Tr. 2556). Yet, in spite of such notice, petitioners took no action whatsoever to assert the rights which they now allege in the petition for review, as amended. Instead, they waited for a period of more than five months or until October 29, 1962, at a time when the Board orders were already five weeks moot and at a time when the agreement of September 21, 1962, between ALPA and Southern ending their dispute was well along towards implementation before asserting any interest

⁷ For the reasons set forth below, pages 38-39, ALPA also submits that petitioners had legal notice of the proceeding before the Board prior to the hearing therein.

or rights to the Civil Aeronautics Board or any other forum. The situation in which petitioners thus now find themselves is entirely of their own making and not the result of events beyond the control of petitioners which prevented a review of their claims prior to the date upon which the Board orders became moot.

Nor is there any public interest in reviewing the claims of petitioners at this time. To the contrary, the public interest lies in a dismissal of the petition for review. In this Court petitioners seek review only of Board orders directing Southern and ALPA to bargain in good faith as required by the provisions of the Railway Labor Act to settle their dispute. In view of the execution and implementation by Southern and ALPA of the agreement settling their dispute, a decision by this Court on the issues raised by petitioners with respect to these orders will have an advisory effect only. It will not establish any legal principles of general applicability in relation to the possibility of further similar litigation because the situation here involved is one which rests upon the particular facts of the dispute between ALPA and Southern and the course taken by that dispute. There is no necessity to consider the petition for review on the ground that it raises a question of the Board's jurisdiction because (1) for reasons set forth below, at pages 28-34 it is the position of ALPA that this issue is not properly before the Court and (2) the issue is not a substantial one in light of the language of the statute, the legislative history of the statute, and long-established administrative interpretation of the statute.

On the other side of the coin, a review of the Board's orders would serve to create uncertainty with respect to a serious labor dispute that is now settled to the detriment of the public and the industry, as well as the parties involved. The nature and length of the dispute which gave rise to the proceeding before the Board was such that its effects spread far beyond the property of Southern Airways. It not only resulted in extensive litigation between ALPA and Southern with respect to the propriety of each party's action, as set forth in the counter-statement of

facts above, but also gave rise to numerous charges and counter-charges between the parties with respect to alleged misconduct and violence, injunctive actions, stockholders' suits, investigation by the Federal Aviation Agency of the safety of Southern's operations (Tr. 1858, 1883, 1884, 1913, 1917, 1918, 1926, 1943, 1944) other complaints by ALPA to the Board of violations by Southern of specific provisions of the Federal Aviation Act (Docket No. 13109), and litigation before the Board concerning Southern's air mail subsidy and the relation of that subsidy to the carrier's actions. (Docket No. 1204).

The effects of the dispute finally extended themselves throughout the aviation industry to such a degree that in the fall of 1961 the Feinsinger Commission established by the President to investigate airline labor disputes was requested by the Secretary of Labor to investigate the ALPA-Southern dispute for the purpose of exploring possible avenues of settlement to end its deleterious effects upon the important segments of public transportation. (Tr. 2715).

All of these effects of the dispute were terminated by the voluntarily executed agreement between ALPA and Southern, dated September 21, 1962. Both parties since that date have been engaged in their primary business of providing air transportation to the public and there has been no further acrimony or litigation. Under such circumstances a review of the Board's actions, as requested by petitioners, would not serve the public interest and should not be undertaken in the absence of compelling reasons therefor. Such reasons do not exist where petitioners simply slept on their claims and made no effort to assert any interest until long after the dispute was settled.

Aside from petitioners' failure to intervene in the Board proceedings during the two-year period the matter was before the Board, petitioners' sole justification for not taking action after they were concededly aware by actual notice of the issues involved and of the Board's intended course of action was a reliance upon Southern. (Tr. 2556). It is obvious that petitioners consciously avoided any applica-

tion to intervene before the Board during any period prior to the time the ALPA-Southern dispute was mooted in anticipation of Southern's ultimate success in opposing such a settlement. They are thus in the position of having gambled upon Southern's ability to represent their asserted interest and having lost. It is submitted that this reliance by petitioners upon Southern cannot serve as a reason for reviewing Board orders now moot.

**B. The Petition for Review Should Be Dismissed
As Untimely Filed**

Section 1006(a) of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1486(a)) provides for judicial review of orders of the Civil Aeronautics Board by a petition filed in an appropriate Court of Appeals "within 60 days after the entry of such order". The statute further provides that after the expiration of such 60-day period a petition for review may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition within the 60-day period. Board order No. E-18560, which directed Southern to comply with its obligations under the Railway Labor Act to bargain in good faith with ALPA, is dated July 5, 1962, and was released on July 6, 1962. The 60-day period to seek review of that order thus expired on September 4, 1962. The petition here involved was filed on October 26, 1962.

The running of the statutory period was not tolled by the filing with the Board of a petition for reconsideration of such order or a rehearing of the issues in the case within the period provided by Rule 37 of the Board's rules of economic practice. Neither ALPA nor Southern sought such reconsideration. Instead, both parties resumed negotiations under the auspices of the National Mediation Board within the 30-day period provided by the Board order which resulted in the ultimate settlement of the dispute. Thus, petitioners' original petition for review, filed in this Court on October 26, 1962, was clearly not timely unless the running of the statutory period was tolled by the issuance of Board order No. E-18737, dated August 27, 1962. This

order was not issued in response to a request by ALPA, Southern or petitioners to the Board to alter or amend order No. E-18560. The order simply clarified the Board's prior opinion in respect to certain matters raised by Southern and rejected the request by ALPA for a further order to Southern directing it to effect immediate compliance with order No. E-18560. Neither Southern nor petitioners could have sought review of Board order No. E-18737 standing alone which constituted only the Board's subsequent clarification of its prior order. *Vulcanized Rubber and Plastics Company v. Federal Trade Commission*, 258 F. 2d 684, 103 U.S. App. D.C. 384 (1958). Consequently, this order cannot serve to toll the running of the statute of limitations for petitioners' seeking a review of order No. E-18560. (See: *Federal Power Comm. v. Idaho Power Co.*, 344 U.S. 17, 20 (1952)).

Finally, the time for the filing of a petition to review the Board orders was not extended by the belated and untimely application of petitioners to the Board on October 29, 1962, to reconsider its orders and to reopen the proceeding. *Marine Midland Trust Company of New York v. Eybro Corporation*, 58 F. 2d 165 at page 168 (2nd Cir., 1932); *Phillips v. Securities and Exchange Commission*, 171 F. 2d 280 (2nd Cir., 1948).

II.

THE BOARD HAD JURISDICTION TO ISSUE THE ORDERS CHALLENGED BY PETITIONERS

Petitioners challenged the jurisdiction of the Board to entertain the complaint filed by ALPA and to issue the orders for which it seeks review. It is the position of ALPA that this issue is not properly before this Court and that the claim is wholly without merit.

A. The Board's Jurisdiction to Entertain ALPA's Complaint Is Not Properly Before the Court

Paragraph (e) of Section 1006 of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1486(e)) provides that no objection to an order of the Board shall be considered upon a petition to review such order unless the objection

shall have been urged before the Board. This condition precedent to the raising of the issue as to the Board's jurisdiction to entertain the ALPA complaint has not been met in this case.

It is true that Southern originally opposed the ALPA complaint on the grounds that exclusive jurisdiction to entertain such complaint rested in what it termed as Railway Labor Act agencies. (Tr. 12). However, this contention was wholly without merit since it is perfectly clear that the only two Railway Labor Act agencies provided for in that statute, i.e. the National Mediation Board and the National Railroad Adjustment Board, had no such jurisdiction.

Southern's position with respect to the Board's jurisdiction to entertain the ALPA complaint was so lacking in merit that Southern did not even urge it on its brief to the Examiner. (Tr. 2072). However, since Southern had raised the question in its answer to the ALPA complaint, both ALPA and the Board's Bureau of Air Enforcement covered the point in their briefs to the Hearing Examiner and argued in support of the Board's jurisdiction. (Tr. 1990, 2125). The Hearing Examiner, in his Initial Decision, considered the issue since it was raised by Southern's answer and found that the Board had the statutory authority to take jurisdiction and make a determination of the issues raised by the pleadings in the case. (Tr. 2169).

Southern did not file any exceptions to the Initial Decision of the Hearing Examiner, including the conclusion that the Board had jurisdiction to determine the issues raised by the complaint. (Tr. 2262). Although ALPA filed exceptions, it did not file an exception with respect to the Hearing Examiner's conclusions with respect to the Board's jurisdiction.

Under the Board's Rule 30(c) of the Board's rules of practice no objection could be made on brief or at a later time to an ultimate conclusion of the Hearing Examiner which is not expressly made the subject of exceptions in compliance with the Board's rules. In addition, no party to the proceeding did in fact question the Board's jurisdic-

tion on their briefs to the Board. (Tr. 2314; 2316; 2366). Consequently, the Board, when it issued order No. E-18560, simply adopted as its own the Hearing Examiner's conclusions as to the statutory basis for the complaint and the Board's jurisdiction. (Tr. 2559).

Nor did petitioners raise any such objection when they finally filed their belated petition for reconsideration of the Board orders.

It is, therefore, submitted that the objection to the lack of jurisdiction to entertain the ALPA complaint was not urged before the Board as required by Section 1006(e) of the Federal Aviation Act of 1958, as amended. *New England Air Express v. Civil Aeronautics Board*, 194 F. 2d 894, 90 U.S. App. D.C. 15 (1952).

B. The Board Had Jurisdiction to Entertain the ALPA Complaint and Issue the Orders Involved

Assuming *arguendo* that the jurisdiction of the Board to entertain the ALPA complaint and issue the orders involved is properly before the Court, it is submitted that the contentions of the petitioners that the Board lacks jurisdiction are wholly without merit.

1. The Language of the Statute Clearly Confers Jurisdiction Upon the Board.

Sections 1002(a), (b) and (c) of the Federal Aviation Act of 1958 (49 U.S.C.A., Sections 1482(a), (b) and (c)) authorize any person to file with the Board a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of the statute. Section 1(27) of the statute defines the word "person" to mean, among other things, any individual, firm, co-partnership, corporation, company, or association. Thus, ALPA was authorized by the statute to file a complaint against Southern alleging violations of the Federal Aviation Act.

Section 1002(a) of the Act goes on to provide that if the person complained against does not satisfy the complaint and there is reasonable ground for investigation of

the complaint, it shall be the duty of the Board to investigate the matters complained of. Under this subparagraph if the Board should find in any investigation instituted upon a complaint that any person has failed to comply with *any provision of the Federal Aviation Act or of "any requirement established pursuant thereto"* the Board shall issue an appropriate order to compel such compliance. In addition, Section 401(g) of the Federal Aviation Act of 1958 (49 U.S.C.A., 1371(g)) authorizes the Board to modify, suspend or revoke certificates of public convenience and necessity for failure of a carrier holding such a certificate to comply with any provision of the Act or "*any term, condition, or limits of such certificate.*" Finally, Section 401(k)(4) of the Federal Aviation Act of 1958 under the heading "*Compliance with labor legislation*" provides that "*it shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with sections 181-188 of Title 45*", i.e. Title II of the Railway Labor Act. In turn, Title II of the Railway Labor Act extends to air carriers all the requirements of the statute relating to collective bargaining set forth in Sections 1, 2, and 4 through 10 thereof (45 U.S.C.A., Sections 151, 152, and 154 through 160).

Thus, the Federal Aviation Act in plain and unambiguous language (1) specifically requires air carriers as a condition of the holding of a certificate to comply with the collective bargaining requirements of the Railway Labor Act, and (2) authorizes the Civil Aeronautics Board generally to compel compliance with provisions of the Federal Aviation Act and specifically to revoke an air carrier's certificate of public convenience and necessity for intentional failure to comply with any condition of its certificate.

It is therefore submitted that when the Board entertained the complaint of ALPA and after hearing on such complaint issued Order No. E-18560 directing Southern to comply with its obligations under the Railway Labor Act to bargain in good faith with ALPA and finding that Southern's failure to so comply would subject its certificate of public convenience and necessity to suspension or revoca-

tion pursuant to Section 401(g) of the Federal Aviation Act, the Board was exercising a jurisdiction clearly conferred upon it by the statute. The brief of petitioners makes no effort to analyze the language of the statute but instead attempts to rely upon other contentions to assert that the statute does not mean what it plainly says. It is submitted that once the Court takes a look at the statute, here the matter ends.

2. The Legislative History of Section 401(k) of the Statute Supports the Plain Meaning Thereof.

Section 401(k) of the Federal Aviation Act of 1958 had its origin in an amendment offered by Mr. David L. Behncke, then President of ALPA, to S. 2 in the hearings on that proposed legislation before the Subcommittee of the Senate Committee on Interstate Commerce considering aviation legislation in March of 1937.⁸ This amendment was in substantially the same form as Section 401(1) of the Civil Aeronautics Act of 1938 which was re-enacted as Section 401(k) of the Federal Aviation Act of 1958. Mr. Behncke explained to the Subcommittee that this legislation was necessary to protect all employees of the aviation industry "both here and abroad" against arbitrary actions.⁹

The proposal was opposed on behalf of the airlines by Mr. Edgar S. Gorrell, President of the Air Transportation Association of America, on the ground that the amendment "necessarily would make the Interstate Commerce Commission the enforcement agency for the Labor Act so far as the air-line employees are concerned."¹⁰

The pilots' provision was also offered as an amendment to H. R. 5234 in the House of Representatives which was

⁸ Hearings on S. 2, March and April 1937, Subcommittee of Senate Committee on Interstate Commerce, pages 22 and 24.

⁹ Hearings on S. 2, Subcommittee of Senate Committee on Interstate Commerce, March and April, 1937, pages 585, 589, 590.

¹⁰ Hearings on S. 2, *supra*, page 450.

considered at about the same time as S. 2, with similar supporting and opposing statements.¹¹

H. R. 9738, which was introduced on March 4, 1938, contained a provision which would permit the National Mediation Board to certify the violation of the Railway Labor Act and then would permit the Civil Aeronautics Authority, after notice and hearing, to suspend a certificate of any air carrier until notification by the National Mediation Board that the violation of the labor statute had ceased.¹² Mr. Behncke opposed this section on the grounds that it was unworkable since the National Mediation Board was not capable under the law of certifying to a violation because its functions were strictly conciliatory. He emphasized that his proposal "is very necessary not only to the pilots but to all other American air workers, not only in this country but those who are employed by American companies operating to and through foreign countries and living in foreign countries."¹³ He also proposed a penalty provision which provided that whenever the Civil Aeronautics Authority should find, after notice and hearing, that an air carrier had violated the provisions of the Railway Labor Act, the Authority "shall forthwith" suspend that carrier's certificate of public convenience and necessity until the violation had ceased.¹⁴ These proposals were again opposed by Mr. Gorrell on the ground that suspension of a certificate was made absolutely mandatory and that the pilots' proposals would inevitably confuse the administration of the Railway Labor Act. He recommended that the Committee at least eliminate the penalty provision of the pilots' amendment,¹⁵ despite his conviction

¹¹ Hearings on H. R. 5234 before the House Committee on Interstate and Foreign Commerce, March and April 1937, pages 202, 213, 370.

¹² Hearings on H. R. 9738 before the House Committee on Interstate and Foreign Commerce, March and April 1938, page 10.

¹³ Hearings on H. R. 9738, *supra*, pages 213, 215, 237, 238.

¹⁴ Hearings on H. R. 9738, *supra*, page 238.

¹⁵ Hearings on S. 3659 before Subcommittee of Senate Committee on Interstate Commerce, April 6 and 7, 1938, page 39.

that it would make the aeronautics authority "the enforcing agency for the Labor Act so far as the air-line employees are concerned."¹⁶

S. 3845 (the bill which became the Civil Aeronautics Act) as passed by the Senate contained the pilots' amendment, including the so-called penalty provision. The House version omitted the penalty provision. The Conference Report contained the pilots' amendment without the penalty provision.¹⁷

In view of this background, there can be little doubt that Section 401(l)(4) of the Civil Aeronautics Act of 1938 (now Section 401(k)(4) of the Federal Aviation Act of 1958) was enacted at the request of the pilots for the purpose of providing effective machinery for the enforcement by the agency administering that statute of the provisions of the Railway Labor Act applicable to air carriers. The only difference between the pilot proposals and the provisions finally adopted was that under the proposal the Board would be required "forthwith" to suspend a certificate of public convenience and necessity upon a determination of a violation of the Railway Labor Act by an air carrier whereas the final version when coupled with Section 401(h) of the statute (now Section 401(g) of the Federal Aviation Act) permits the Board to suspend or revoke a certificate for such a determination.

3. The Board Has Consistently Interpreted the Federal Aviation Act of 1958 and Its Predecessor Statute, the Civil Aeronautics Act of 1938, as Authorizing It To Enforce the Provisions of the Railway Labor Act Against Air Carriers.

The petitioners contend that the present proceeding before the Board was a case of first impression and thereby seek to leave the inference that the Board had never before considered its authority to enforce the provisions of the Railway Labor Act in the course of its regulation of air carriers.

¹⁶ See Hearings on S. 2, *supra*, page 450; and Hearings on H. R. 5234, *supra*, page 370.

¹⁷ H. R. Report No. 2065, 75th Cong., 2d Sess., page 69.

It is true that the present proceeding is the first case which has ever proceeded to decision before the Board involving a complaint filed by a labor organization against an air carrier. However, the Board as far back as 1947, in passing upon an agreement submitted to it under Section 412 of the Civil Aeronautics Act (now Section 412 of the Federal Aviation Act—49 U.S.C.A., Section 1382), which requires that the Board find that agreements subject to that Section do not violate the statute, passed upon the issue of whether the agreement met the requirements of the Railway Labor Act. *Airlines Negotiating Conference*, 8 C.A.B. 354 (1947).

Again in 1959, the Board, in acting on the so-called "Six Carrier Mutual Aid Pact" (Docket No. 9977) under Section 412, stated that "Since both the Federal Aviation Act and the Railway Labor Act provide that every air carrier, and its employees, must comply with the applicable provisions of the latter statute, its measurement of the agreement against the standards contained in Section 412 begins with the inquiry whether the agreement violates the Railway Labor Act."¹⁸

This application of the provisions of the Railway Labor Act by the Board over a period of more than 15 years establishes an administrative precedent which gives great weight to the Board's present interpretation of its duties. *United States v. American Trucking Associations*, 310 U.S. 534, 549 (1940)).

III.

THE BOARD WAS NOT REQUIRED TO MAKE PETITIONERS PARTIES TO THE PROCEEDING ON ALPA'S COMPLAINT IN THE ABSENCE OF A TIMELY PETITION TO INTERVENE THEREIN

Petitioners argue in their brief (Point II, pages 12-15) that they were indispensable parties to the proceeding before the Board and that, therefore, the Board had no right to proceed with a hearing upon ALPA's complaint

¹⁸ The Board cited Section 401(k)(4) of the Federal Aviation Act in footnote 11, page 4, of its opinion as requiring air carrier compliance with the Railway Labor Act.

and the issuance of the orders here involved even though petitioners did not file a timely petition to intervene in these proceedings.

It is the position of ALPA that (1) the issue raised by petitioners is not properly before this Court; (2) petitioners had a legal duty to intervene in accordance with the Board's regulations covering intervention; (3) their failure to do so cannot be justified upon the basis of lack of notice since they had legal notice of the proceeding; and (4) in any event, after they were admittedly aware of the proceeding, its course, and the issues involved, they made no timely effort to assert their alleged interest.

A. Petitioners' Claim That They Were Indispensable Parties to This Proceeding Is Not An Issue Properly Before This Court?

It is respectfully submitted that the claim raised by petitioners that they were indispensable parties to the Board proceeding and should have been made parties by Board action is not properly before this Court because of the provisions of Section 1006(e) of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1486(e)), providing that no objection to an order of the Board shall be considered by the Court unless such objection shall have been urged before the Court, or unless not so urged, that there was reasonable ground for failure to do so. Petitioners made no claim to the Board that they were indispensable parties to the proceeding in Docket No. 11654 until they filed their petition to intervene and reopen the proceeding on October 29, 1962, almost three months after the basic Board order in the proceeding had been issued and almost six weeks after the dispute between ALPA and Southern had been terminated by the agreement of September 21, 1962. (Tr. 2685). The requirements of Section 1006(e) cannot be met by any such belated effort on the part of petitioners. Certainly the requirements of this Section mean nothing unless they mean that a party which is making objections to Board action must raise the objection at a time when the Board is in the position to take effective action with respect

thereto. *Red River Broadcasting Co. v. F.C.C.*, 98 F. 2d 282, 69 App. D.C. 1 (1938), cert. den., 305 U.S. 625.

Nor can petitioners cite any reasonable grounds to this Court for their failure to meet the requirements of Section 1006(e) with respect to the objection which they raise. Assuming *arguendo* that they did not have legal notice of the Board hearing, they nevertheless admittedly had notice of the proceeding and the issues involved when the Initial Decision of the Hearing Examiner was issued on September 26, 1961 (Tr. 2169), and they had actual notice of the Board's intended action and decision on May 25, 1962. (Tr. 2754). If petitioners believe that they were indispensable parties to the proceeding before the Board, it was certainly incumbent upon them to take action to assert that right before the Board at least within a reasonable time after they had this actual notice. They did not do so. Instead, they waited until long after the proceeding before the Board was moot and the dispute which gave rise to the proceeding was moot and then attempted to assert this objection. It is recognized that if a party may meet the requirements of Section 1006(e) in this manner, it would produce chaos in administrative proceedings.

B. Petitioners Had a Legal Duty to Assert Any Interest They Had in the Proceeding on ALPA's Complaint by the Filing of a Petition to Intervene Therein in Accordance With the Board's Regulations

There are quoted above, page 8, the provisions of Section 302.201 of the Board's rules of practice in economic proceedings defining parties to an economic enforcement proceeding such as the proceeding before the Board in Docket No. 11654 on ALPA's complaint. This regulation provides that parties to such a proceeding shall be (1) the Board, represented by the Enforcement Attorney; (2) the respondent; (3) the complainant; and (4) "any other person permitted to intervene pursuant to Section 302.15" of the Board's rules. The intervention provision of the Board's rules to which reference is thus made (Rule 15 of the Board's rules of practice in economic proceedings)

permits intervention in Board proceedings by (1) any person who has a statutory right to be made a party and (2) any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business. Intervention is accomplished under this rule by the filing of a timely petition to intervene (which, in the case of the proceeding in Docket No. 11654 here involved, was required to be filed not later than 15 days prior to the hearing). The rule also permits a late-filed petition upon a showing of good cause for failure to file on time.

Thus, whether a prospective intervenor is asserting merely a permissive right or an alleged statutory right to intervene in a Board proceeding, he must assert that right by a petition filed in accordance with the Board's rules. *Red River Broadcasting Co. v. F.C.C.*, *supra*.

The petitioners' brief makes no reference at all to these Board rules and is premised upon the contention that it is the Board's duty to make them a party to the proceeding without the filing of an intervention petition. In order to establish the validity of this proposition, petitioners must demonstrate that the rule is an unreasonable one. Petitioners' own actions with respect to the Board proceeding show that they do not have any confidence in the validity of this argument by reason of the fact that they finally did file a petition with the Board on October 29, 1962, long after the proceedings had been completed, to intervene therein. (Tr. 2685). In addition, it is clear that the Board's rule is a reasonable regulation of Board proceedings and that petitioners were required to seek intervention in the proceeding. *Home Loan Bank Board v. Mallonee*, 196 F. 2d 336, 376 (9th Cir., 1952), cert. den. 345 U.S. 952; reh. den. 345 U.S. 978.

C. Petitioners Cannot Justify a Failure to Seek Timely Intervention in the Board Proceeding on Lack of Notice as They Had Legal Notice of the Hearing

Section 8 of the Federal Register Act (44 U.S.C.A., Section 308) provides for the giving of notice of administrative hearings by a filing in the Federal Register. This Section reads as follows:

"Whenever notice of hearing or of opportunity to be heard is required or authorized to be given by or under an Act of Congress, or may otherwise properly be given, the notice shall be deemed to have been duly given to all persons residing within the States of the Union and the District of Columbia, except in cases where notice by publication is insufficient in law, if said notice shall be published in the Federal Register at such time that the period between the publication and the date fixed in such notice for the hearing or for the termination of the opportunity to be heard shall be (a) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of the Congress; or (b) not less than fifteen days when no time for publication is specifically prescribed by the Act, without prejudice, however, to the effectiveness of any notice of less than fifteen days where such shorter period is reasonable."

The requirements of this statute were met by the Board. The hearing was originally scheduled to begin on November 15, 1960, and a notice of the hearing signed by the Chief Examiner was published in the Federal Register on October 28, 1960 (Vol. 25, page 10372). Subsequently, on November 8, 1960, a notice was issued, signed by the Board's Chief Examiner, which appeared in the Federal Register for that date (Vol. 25, page 10667), postponing the hearing in the proceeding from November 15 to December 1, 1960, at which time the hearing began. Thus, the Board gave at least 22 days' notice by publication in the Federal Register of the commencement of the hearing in the proceeding in Docket No. 11654. Since no specific time is provided in the statute for such notice, this complied with the requirements of the Federal Register Act and constituted legal notice of the hearing to petitioners. *Aris*

Gloves, Inc. v. United States, 281 F. 2d 954 (CCPA, 1958).

Petitioners cannot be heard to say that this notice was inadequate because it did not spell out the issues involved in the proceeding. They had been hired by Southern as replacement pilots in the strike situation and knew that a dispute was in progress between ALPA and Southern. It is submitted that the notice to them through publication in the Federal Register that the Board was hearing a case of ALPA against Southern Airways was sufficient notice under the circumstances to convey to petitioners the fact that there was a proceeding before the Civil Aeronautics Board involving the strike in which they had accepted positions as replacement pilots which could affect their situation. It is unrealistic to contend that a notice of hearing in a case involving ALPA and Southern, published at a time when the dispute in question was the subject of much litigation, publicity, and charges and counter-charges, could have had reference to anything else.

It is thus the position of ALPA that the petitioners had legal notice as required by the Federal Register Act of the hearing and were required to assert their interest in the proceeding to the Civil Aeronautics Board at least within a reasonable time after the publication of such notice.

Nor can petitioners rely on an argument that they did not have sufficient time to seek intervention because such petition was supposed to be filed under the Board's rules within 15 days prior to the Board hearing. The rules, as cited above, permit a later filing upon the showing of "good cause". Petitioners made no effort to do so and waited almost two years before asserting any interest in the proceeding.

D. Petitioners Had Actual Notice of the Board Proceeding Which Required a Timely Assertion of Their Interest

Assuming *arguendo* that the notice of the hearing in the Board proceeding published in the Federal Register was insufficient to put petitioners upon notice and require action on their part to assert a right to be heard, the record is clear that petitioners had an actual notice of such proceeding, the issues involved, and the likelihood of Board

action affecting their interest which required an assertion of their alleged rights prior to the issuance of the Board orders. Petitioners have admitted actual notice of the Initial Decision of the Hearing Examiner (Tr. 2169) and actual notice of the Board's intended action as set forth in its press release of May 25, 1962 (Tr. 2754). They took no action based on this actual notice but waited for a substantial period of time until after the Board orders and the dispute which gave rise to those orders became moot. They are now in no position to contend that the Board's action is invalid because they were indispensable parties to the proceeding and the Board failed to make them parties. Even the most important rights must be timely asserted or there will never be an end to any litigation. Petitioners' failure in this case to assert their rights was not a result of any action of the Board or ALPA, but simply their own decision. None of the cases cited by petitioners in their brief (pages 12-15) involve a situation like this one where parties asserting an interest in a proceeding failed to act, even after actual notice, until the proceeding and the subject matter thereof was moot.

IV.

THE CIVIL AERONAUTICS BOARD DID NOT ERR IN ITS ORDERS IN THIS CASE

A. The Civil Aeronautics Board Correctly Found That the Bargaining Demands Made By Southern Were Unlawful and Constituted Unfair Labor Practices

During the July, 1960 negotiations with ALPA, Southern demanded, as a condition of settlement of the dispute then in progress, that

1. Southern should have the complete and non-reviewable right to discipline strikers who had engaged, during the strike, in conduct which it considered unlawful; and
2. The striking employees forfeit the seniority which they had accrued for service in Southern's employ prior to the date of their return to work, and superseniority to be conferred upon the replacements. (See pages 4, 5 above)

The relief granted by the Board was predicated upon its finding that the foregoing demands by Southern constituted a refusal to bargain in good faith, thus transforming the work stoppage into an unfair labor practice strike.

Section 2, First of the Railway Labor Act, reads as follows:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The duty of a carrier to exert every reasonable effort to make and maintain an agreement under Section 2, First of the Railway Labor Act (45 U.S.C.A., Section 152, First) has been equated with the duty of an employer to bargain in good faith imposed by Section 8(a)(5) and 8(d) of the National Labor Relations Act (29 U.S.C.A., Sections 168(a)(5) and 168(d)). *Trainmen v. Toledo, P. & W. Railroad*, 321 U.S. 50, 61 (1944); *American Airlines, Inc. v. ALPA*, 169 F. Supp. 777 (S.D. N.Y., 1958).

The prohibitions against a carrier engaging in coercive activity under Section 2, Third and Fourth of the Railway Labor Act are similar to the obligations of employers under Section 8(a)(1) and (3) of the National Labor Relations Act. *Texas and N. O. Railroad v. Clerks*, 281 U.S. 548 (1930); *Railroad Trainmen v. Georgia Railway*, 305 F. 2d 605 (5th Cir. 1962). Therefore, acts that would constitute a breach of an employer's duty to bargain in good faith under the National Labor Relations Act are violative of a carrier's duty under Section 2, First of the Railway Labor Act and acts that constitute violations of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act constitute violations under Section 2, Third and Fourth of the Railway Labor Act.

It is coercive activity and a violation of Section 2 of the Railway Labor Act to deprive strikers of any rights or

privileges because they engage in a strike. The demands of Southern, found to be unlawful by the Board, were of such a character.

1. The Forfeiture of Seniority Demand of Southern Was Unlawful.

It was found as a fact by the Board, and not disputed by Petitioners (Petitioners' brief, p. 23) that Southern insisted, as a condition of reaching agreement with ALPA, that the strikers forfeit all seniority accrued by them for service in Southern's employ prior to the strike. Southern's demand was that the strikers' seniority should commence as of the date on which they return to work.

The effect of this demand by Southern was to subject Southern's regular pilots to substantial losses with respect to wages, bidding rights, vacation pay and other job rights theretofore conferred upon them under ALPA's collective bargaining agreement with Southern. The Board concluded that Southern made this demand to punish the strikers for exercising their lawful right to strike (Decision of the Board, Tr. 2578). The inherently coercive nature of Southern's demand, and the impact of that demand upon the right of employees to organize and bargain collectively through representatives of their own choosing is evident. Such a demand represents an unlawful discrimination by Southern as between the striking pilots and the replacements and it is, as a matter of law, unlawful. *NLRB v. Robinson*, 251 F. 2d 639 (6th Cir. 1958); *NLRB v. Wheeling Pipe Line, Inc.*, 229 F. 2d 391 (8th Cir. 1956).

Southern's insistence on such a provision as a condition of entering into an agreement represents a failure to bargain in good faith. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958); *NLRB v. N.M.U.*, 175 F. 2d 686 (2d Cir. 1949).

But it is not only Southern's position on forfeiture of seniority by strikers that was illegal. In addition, Southern demanded that replacements be placed on a priority list thus giving them job rights senior to those of all of the strikers. This conditioning of an agreement upon superseniority for the replacements was also illegal.

An employer may hire replacement employees in the course of an economic strike and need not, at the conclusion of the strike, discharge such replacements to make room for the returning strikers (*NLRB v. Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1938)). The employer may not, however, grant "superseniority" to replacements in the sense of giving them seniority over the strikers for protection from future layoffs except where such a grant is absolutely necessary to keep the employer's business in operation during the strike. *Erie Resistor Corp. v. NLRB*, 303 F. 2d 359 (3rd Cir. 1962); *Swarco, Inc. v. NLRB*, 303 F. 2d 668 (6th Cir. 1962); *Ballas Egg Products, Inc. v. NLRB*, 283 F. 2d 871 (6th Cir. 1960); *Olin Mathieson Chemical Corp. v. NLRB*, 232 F. 2d 158 (4th Cir. 1956), aff'd. 352 U.S. 1020; *NLRB v. California Date Growers Ass'n*, 259 F. 2d 587 (9th Cir. 1958).

It is currently the view of the National Labor Relations Board that a grant of superseniority is illegal *per se* and that an employer's insistence on superseniority for replacements is a *per se* violation of the employer's duty to bargain in good faith. See *Erie Resistor Corp.*, 132 N.L.R.B. 621; *Griffin Wheel Co.*, 136 N.L.R.B. No. 144.

The National Labor Relations Board argues that a strict prohibition of superseniority is justified, since

1. The *Mackay* decision contemplates non-discriminatory and complete reinstatement of unreplaced strikers;
2. An offer of superseniority is an unlawful offer of benefit to individual strikers if they abandon the strike and return to work;
3. The discrimination effected by superseniority lasts indefinitely;
4. Superseniority improperly divides the strikers among themselves by means of threats and promises;
5. Superseniority renders future bargaining difficult if not impossible and introduces a continual irritant;
6. Superseniority grants a permanent preference to those who do not join the strike, clearly discouraging strike activities and union membership; and

7. Superseniority is so destructive of statutory rights and guarantees that no claim of necessity can justify such conduct by an employer.

It was not necessary for the Civil Aeronautics Board to follow the *per se* doctrine of the National Labor Relations Board under the facts of this case. The record below is completely devoid of evidence that it was necessary to promise superseniority to the replacements in order to induce them to enter Southern's employ, or that such a promise was made. On the contrary, the record shows that Southern gave no such assurances to the replacements at the time they were hired (Tr. 860-864, 961-963, 1017-1027). Under such circumstances, the only purpose of Southern's demand was to punish the strikers and to apply a forbidden coercion and restraint to them.

Moreover, the grant of superseniority was not limited to job retention purposes. The grant, if acceded to, would have placed the strikers below the replacements, not only for job tenure purposes but for all other seniority purposes as well.

On these facts, the conclusion is inescapable that Southern made its demand with the objective of punishing the strikers and discouraging union activities, and not for the purpose of protecting any of its legitimate business interests or in the interests of the replacements.

Controlling decisions of the United States Supreme Court and of the Courts of Appeals establish that it was coercive and a failure to bargain in good faith for Southern to condition any agreement to be reached upon a forfeiture of the strikers' seniority and a grant of superseniority to the replacements. See *Olin Mathieson Chemical Corp. v. NLRB*, 232 F. 2d 158 (4th Cir. 1956), *aff'd*. 352 U.S. 1020 (1957); *Swarco, Inc. v. NLRB*, 303 F. 2d 668 (6th Cir. 1962); *Erie Resistor Corp. v. NLRB*, 303 F. 2d 359 (3rd Cir. 1962); *NLRB v. California Date Growers Association*, 259 F. 2d 587 (9th Cir. 1958); *Stewart Die Casting Corp. v. NLRB*, 114 F. 2d 849 (7th Cir. 1940), *enforcing as modified*, 14 NLRB 872, *cert. den.* 312 U.S. 680 (1941).

The Civil Aeronautics Board did not err in following this well settled body of law.

2. Southern's Non-Reviewable Discipline Demand Was Unlawful.

In its demand for the unilateral and unreviewable right to discipline strikers, Southern was not reserving to itself merely the power to discipline striking employees for misconduct. This power it had as the employer of the striking pilots, and ALPA has never questioned Southern's right to discipline the striking pilots for misconduct committed during the strike or at any other time. ALPA did object to the demand by Southern that neither the pilots nor their representatives have the right to question Southern's unilateral determination (1) that misconduct had occurred, and (2) that such misconduct warranted any punishment, including ineligibility to return to work, that Southern saw fit to impose on the pilots.

Under Southern's demand, disciplinary action could well be a subterfuge to conceal Southern's illegal discrimination on the basis of union activities. *Cf. Railroad Trainmen v. Georgia Railway*, 305 F. 2d 605 (5th Cir. 1962).

Southern's employees, subject to the Railway Labor Act, would, under Southern's demand, surrender their right to utilize the System Board of Adjustment, the only procedure available under the Railway Labor Act for the determination of a grievance arising from an alleged discriminatory discharge. Such Boards are required by Section 204 of the Railway Labor Act (45 U.S.C.A., Section 184). By seeking to deny to these pilots the right to resort to the statutory grievance procedures, Southern was insisting on the power to discharge them for discriminatory reasons without any redress whatsoever. *Cf. Wilson & Co., Inc. v. NLRB*, 120 F. 2d 913, 924 (7th Cir. 1941).

Furthermore, a non-reviewable power to discipline striking pilots in the hands of Southern would make the pilots' seniority rights and job rights hollow indeed. Southern's insistence on this disciplinary power was thus as much a cause of the prolongation of the strike as was Southern's illegal demand with respect to seniority. Such conduct

constitutes a refusal to bargain in good faith and is therefore a violation of carrier's duty under Section 2, First of the Railway Labor Act, "to exert every reasonable effort to make and maintain an agreement" with the Association, the duly designated representative of the Southern pilots.

The Board has found as a fact that it was the assertion by Southern of "unlawful and punitive conditions which immediately led to 'a hopeless impasse'." (Board Order No. E-18560, Tr. 2565). Under Section 1006(e) of the Federal Aviation Act of 1958, the Board's findings of fact are entitled to conclusive weight unless shown to be unsupported by substantial evidence. This Court is, therefore, entitled to conclude, since substantial evidence to the contrary has not been and could not be shown, that Southern's unfair labor practices caused the labor dispute to continue, and that the strike thereafter, was an unfair labor practice strike.

B. The Civil Aeronautics Board Correctly Found That By Reason of Southern's Unlawful Demands the Strike Became an Unfair Labor Practice Strike. Thus Entitling Strikers Not Yet Replaced to Reinstatement With Their Seniority Unimpaired

On July 12, 1960, when Southern first made its illegal demands, the strike by Southern's pilots (whatever its nature may have been previously) became an "unfair labor practice" strike. *NLRB v. Giustina Bros. Lumber Co.*, 235 F. 2d 371 (9th Cir. 1958); *NLRB v. Crosby Chemicals, Inc.*, 188 F. 2d 91 (5th Cir., 1951); *Kohler Co.*, 128 NLRB 1062, 1083-4, 1085-7, 1109 (1960), enforced in part, 300 F. 2d 699 (D.C. Cir. 1962), *cert. den.* 368 U.S. 82 (1962).

Where a cause of the prolongation of the strike is an unfair labor practice by an employer, that strike becomes an unfair labor practice strike even though there may be other causes of the continuance of the strike.¹⁹ Thus, in *NLRB v. Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898

¹⁹ Such other causes do not exist here.

(6th Cir., 1956), where the Court found that economic issues were "a cause of the strike", it said: (page 907)

"The Union contended that in any event the unfair labor practice of the company was a contributing cause of the strike, which as a matter of law requires that the strike be treated as an unfair labor practice strike. That such is the legal consequence of such a factual situation appears settled (citing cases). * * * ."

See also: *General Drivers, Local 662 v. NLRB*, 302 F. 2d 908 (D.C. Cir., 1962); *NLRB v. Mt. Clemens Pottery Co.*, 147 F. 2d 262 (6th Cir., 1945).

The conversion of the strike into an unfair labor practice strike by reason of Southern's illegal demand on July 12, 1960, entitled the striking employees to reinstatement as of that date with seniority unimpaired, thus giving them job rights prior to those of any replacements hired on or after July 12, 1960. *NLRB v. Wooster Division of Borg-Warner Corp.*, *supra*; *NLRB v. Deena Artware, Inc.*, 198 F. 2d 645 (6th Cir., 1952), and cases cited therein.

C. The Board Did Not Err in Dismissing Petitioners' Untimely Application to Intervene in the Board Proceeding and for Reconsideration of the Board's Orders Along With a Rehearing

There has already been set forth fully in other portions of this brief the fact that petitioners waited until October 26, 1962, at a time when the Board orders and the dispute between ALPA and Southern had become moot to seek to intervene in the proceeding for the purpose of reconsideration of such orders and a reopening of the proceeding. There has also been fully discussed the fact that there was no justification shown by petitioners for waiting until such time to assert an interest in the proceeding, since they had been on notice of the proceeding at least since September 26, 1961, and had had actual notice of the Board's intended action on May 25, 1962. The Board, therefore, did not act in an arbitrary and unreasonable manner nor did it deprive petitioners of any legal right by dismissing their belated petition by its order of January 3, 1963.

ALPA DID NOT VIOLATE ANY DUTY OWED TO PETITIONERS

Petitioners claim that ALPA did not properly represent them because they are entitled to a priority in job and seniority status notwithstanding Southern's unfair labor practices and bad faith bargaining. This claim was never asserted to the Board until the proceeding was moot. Moreover, this is nothing more than a claim that Southern should have discriminated in their favor, by granting them super-seniority. Understandably, petitioners also claim a right to the assistance of ALPA to achieve such favorable discrimination for them at the expense of the striking pilots, even though such striking pilots would all have returned to work on July 12, 1960, but for the unlawful conduct of the employer.

Petitioners' assertion that ALPA has failed to discharge duties owed them is based simply upon their obvious desire for preferred treatment. However, petitioners do not suggest any legal or equitable justification for an abandonment of the job and seniority rights of the pilots hired prior to June 5, 1960, in favor of the replacement pilots hired on or after that date. Nor do they deny that it was the paramount and enforceable obligation of ALPA to protect the striking pilots against the effect of the company's unlawful conduct.

Petitioners' failure to avail themselves of the liberal procedures for intervention in proceedings before the Civil Aeronautics Board after they had, as they admit, actual notice of such proceedings is not traceable to the violation of any duty owed them by ALPA.

Petitioners condemn the execution between ALPA and Southern of the agreement of September 21, 1962. The provisions of that agreement specifically challenged by petitioners provide for the reinstatement of the striking pilots to their former employment with seniority unimpaired.

But petitioners insist that the returning strikers are entitled to something less than reinstatement with seniority unimpaired. That insistence sharply conflicts with a uni-

formly accepted body of law, and with the orders of the Board which closely follow that body of law. Indeed, had Southern refused to reinstate, with seniority unimpaired, employees whose strike was prolonged by that employer's unfair labor practice, such conduct itself would be discriminatory and illegal. See *Washougal Woolen Mills*, 23 NLRB 1 (1940); *Shenandoah Dives Mining Co.*, 35 NLRB 1153 (1941).

Viewed in proper perspective, petitioners' claim that ALPA has violated a duty owed to them is simply an objection to the uniform application of the principle of seniority to them. Agreements between ALPA and Southern have long contained provisions conferring upon pilots a seniority classification based upon date of hire by Southern. Such seniority classification has always governed the pilots' job rights, including wages, bidding, sequence of furlough, and many other such matters. This principle is applied within the group uniformly, and without discrimination.

Seniority is plainly a proper subject for collective bargaining between an employer and the representative of his employees. See, e.g. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Inland Steel Company v. NLRB*, 170 F. 2d 247, cert. den. 336 U.S. 960 (1949). The uniform application of the principle of seniority based upon date of hire has been sustained as a fair and reasonable exercise of the duty of a collective bargaining representative. *Grand Lodge v. Girard Lodge*, 384 Pa. 248, 120 A. 2d 523 (1956).

CONCLUSION

Upon the basis of the foregoing points and authorities ALPA submits that the Court, upon a hearing of the petition for review in this case, as amended, should:

1. Dismiss the petition for review; or
2. Affirm the orders of the Civil Aeronautics Board which petitioners seek to set aside.

Respectfully submitted,

HENRY WEISS
HERBERT LEVY
50 East 42nd Street
New York 17, New York

JAMES L. HIGSAW, JR.
620 Tower Building
Washington 5, D. C.

*Attorneys for Intervenor
Air Line Pilots Association*

APPENDIX A**Statutes and Regulations Involved****FEDERAL AVIATION ACT OF 1958****I. Section 1(27) of the Act (49 U.S.C.A., Section 1301 (27)):**

"Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

II. Section 401(g) of the Act (49 U.S.C.A., Section 1371 (g)):

The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

III. Section 401(k) of the Act (49 U.S.C.A., Section 1371 (k)):

(1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with decision numbered 83 made by the

National Labor Board on May 10, 1934, notwithstanding any limitation therein as to the period of its effectiveness.

(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within a Territory or possession of the United States, the minimum of which shall be not less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

(3) Nothing herein contained shall be construed as restricting the right of any such pilots or copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with sections 181-188 of Title 45.

(5) The term "pilot" as used in this subsection shall mean an employee who is responsible for the manipulation of or who manipulates the flight controls of an aircraft while under way including take-off and landing of such aircraft, and the term "copilot" as used in this subsection shall mean an employee any part of whose duty is to assist or relieve the pilot in such manipulation, and who is properly qualified to serve as, and holds a currently effective airman certificate authorizing him to serve as, such pilot or copilot.

IV. Section 412(b) of the Act (49 U.S.C.A., Section 1382 (b)):

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air car-

rier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

V. Section 1002(a), (b) and (c) of the Act (49 U.S.C.A., Section 1382(a), (b) and (c)):

(a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed Forces of the United States acting in the performance of his official duties, the Administrator or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The Secretary shall, within ninety days after receiving such a complaint, inform the Administrator or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary actions taken.

(b) The Administrator or Board, with respect to matters within their respective jurisdictions, is empowered at any time to institute an investigation, on their own initiative, in any case and as to any matter or thing within their respective jurisdictions, concerning which complaint is authorized to be made to or before the Administrator or Board by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Administrator or the Board shall have the same power to proceed with any investigation

instituted on their own motion as though it had been appealed to by complaint.

(c) If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this chapter or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith.

VI. Section 1006(a) of the Act (49 U.S.C.A., Section 1486(a)):

Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

VII. Section 1006(e) of the Act (49 U.S.C.A., Section 1486(e)):

The findings of fact by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

RAILWAY LABOR ACT

I. Sections 2, First through Fourth of the Act (45 U.S.C.A., Sections 152, First through Fourth):

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable

effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable

to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representative of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

II. Sections 5, First and Second of the Act (45 U.S.C.A., Sections 155, First and Second):

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section

160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

- Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

III. Section 6 of the Act (45 U.S.C.A., Section 156):

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of services of the Mediation Board.

IV. Section 10 of the Act (45 U.S.C.A., Section 160):

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may

thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

V. Section 201 of the Act (45 U.S.C.A., Section 181):

All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

VI. Section 204 of the Act (45 U.S.C.A., Section 184):

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted

on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

FEDERAL REGISTER ACT

I. Section 8 of the Act (44 U.S.C.A., Section 308):

Whenever notice of hearing or of opportunity to be heard is required or authorized to be given by or under an Act of Congress, or may otherwise properly be given, the notice shall be deemed to have been duly given to all persons residing within the States of the Union and the District of Columbia, except in cases where notice by publication is insufficient in law, if said notice shall be published in the Federal Register at such time that the period between the publication and the date fixed in such notice for the hearing or for

the termination of the opportunity to be heard shall be (a) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of the Congress; or (b) not less than fifteen days when no time for publication is specifically prescribed by the Act, without prejudice, however, to the effectiveness of any notice of less than fifteen days where such shorter period is reasonable.

NATIONAL LABOR RELATIONS ACT

I. Sections 8(a)(1), 8(a)(3), 8(a)(5), and Section 8(d) of the Act (29 U.S.C.A., Sections 158(a)(1), 158(a)(3), 158(a)(5), and Section 158(d)):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided, further*, That no employer shall justify any discrimination against an employee for non-

membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition for acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and condition of employment * * * .

REGULATIONS OF CIVIL AERONAUTICS BOARD

I. Part 302 of the Board's Economic Regulations, 17 F.R. 3020, et seq., as amended; 26 F.R. 8054; 27 F.R. 12545:

Section 302.15(a):

(a) Who may intervene. (1) Any person who has a statutory right to be made a party to a proceeding shall be permitted to intervene therein.

(2) Any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business may be permitted to intervene in any proceeding.

Section 302.15(c):

(c) Petition to intervene. (1) Contents. Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he thinks he should be permitted to intervene. The petition should make specific reference to the factors set forth in paragraph (b) of this section.

(2) Time for filing. Unless otherwise ordered by the Board, any petition for leave to intervene shall be filed within the following time limits:

(i) In a proceeding where the Board issues a show cause order proposing fair and reasonable mail rates, such petition shall be filed within the time specified for filing notice of objection.

(ii) In all other proceedings, including mail rate proceedings where no show cause order is issued, the petition shall be filed with the Board prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.

(iii) A petition to intervene in any Board proceeding filed by a city, other public body, or a chamber of commerce shall be filed with the Board not later than the last day prior to the beginning of the hearing thereon.

A petition for leave to intervene which is not timely filed shall be dismissed unless the petitioner shall clearly show good cause for his failure to file such petition on time.

(3) Answer. Any party to a proceeding may file an answer to a petition to intervene, making specific reference to the factors set forth in paragraph (b) of this section, within seven (7) days after the petition is filed.

(4) Disposition. The decision granting, denying or otherwise ruling on any petition to intervene may be issued without receiving testimony or oral argument either from the petitioner or other parties to the proceeding.

Section 302.30(c):

(c) Effect of failure to file timely and adequate exceptions. No objection may be made on brief or at a later time to an ultimate conclusion which is not expressly made the subject of an exception in compliance with the provisions of this section: *Provided, however,* That any party may file a brief in support of the decision and in opposition to the exceptions filed by any other party.

Section 302.37(a):

(a) Board orders subject to reconsideration; time for filing. Unless an order or a rule of the Board specifically provides otherwise, any party to a proceeding may file a petition for reconsideration, rehearing or reargument of (1) a final order issued by the Board or (2) an interlocutory order issued by the Board which institutes a proceeding or defines the scope and issues of a proceeding or suspends a provision of a tariff on file with the Board. Unless the time is shortened or enlarged by the Board, petitions for reconsideration shall be filed, in the case of a final order, within twenty (20) days after service thereof, and, in the case of an interlocutory order, within ten (10) days after service. However, neither the filing nor the granting of such a petition shall operate as a stay of such final or interlocutory order unless specifically so ordered by the Board. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition. Motions for extension of time to file a petition or answer, and for leave to file a petition or answer after the time for the filing thereof has expired, will not be granted by the Board except on a showing of unusual and exceptional circumstances, constituting good cause for movant's inability to meet the established procedural dates.

Section 302.201:

Any person may make a formal complaint to the Board with respect to anything done or omitted to be done by any person in contravention of any economic regulatory provisions of the act, or any rule, regulation, order, limitation, condition or other requirement established pursuant thereto. Every formal complaint shall conform to the requirements of § 302.3, concerning the form and filing of documents. The submission of a formal complaint by a person other than an Enforcement Attorney (hereinafter called a third party) shall not in itself result in the institution of a formal economic enforcement proceeding and a hearing with respect to the complaint unless and until the Director of the Bureau of Enforcement docket a petition for enforcement with respect to such complaint, or a portion thereof, in accordance with § 302.206. * * * .

Section 302.207:

(a) Within fifteen (15) days after the date of service of a petition for enforcement docketed pursuant to § 302.206, the respondent shall file an answer to the complaint attached thereto or incorporated therein unless an answer has already been filed in accordance with § 302.204. Any requests for extension of time for filing of answer to complaint attached to or incorporated in a petition for enforcement shall be filed with the Board in accordance with § 302.17.

(b) All answers shall conform to the requirements of § 302.8(a)(2) and shall fully and completely advise the parties and the Board as to the nature of the defense and shall admit or deny specifically, and in detail, each allegation of the complaint unless the person complained of is without knowledge, in which case, his answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed to be controverted.

Section 302.209:

The Board (or the Examiner) may, in its discretion, require or permit the filing of a reply in appropriate cases, otherwise no reply shall be filed.

Section 302.210:

The parties to an economic enforcement proceeding shall be the Board (represented by an Enforcement Attorney), the respondent, any person whose formal complaint alleged violations which were later covered by the petition for enforcement, and any other person permitted to intervene pursuant to § 302.15.

